

**7 CFR**  
**Agriculture**  
**Subtitle B - [ Regulations of the Department of Agriculture (Continued)]**  
**CHAPTER II**  
**FOOD AND NUTRITION SERVICE, DEPARTMENT OF AGRICULTURE**  
**SUBCHAPTER A -- CHILD NUTRITION PROGRAMS**

**PART 226 -- CHILD AND ADULT CARE FOOD PROGRAM**

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- Appendix C to Part 226 -- Child Nutrition (CN) Labeling Program
- Authority:** Secs. 9, 11, 14, 16, and 17, National School Lunch Act, as amended (42 U.S.C. 1758, 1759a, 1762a, 1765 and 1766).
- Source:** 47 FR 36527, Aug. 20, 1982, unless otherwise noted.

### **Subpart A -- General**

#### **§226.1 General purpose and scope.**

This part announces the regulations under which the Secretary of Agriculture will carry out the Child and Adult Care Food Program. Section 17 of the National School Lunch Act, as amended, authorizes assistance to States through grants-in-aid and other means to initiate, maintain, and expand nonprofit food service programs for children or adult participants in nonresidential institutions which provide care. The Program is intended to enable such institutions to integrate a nutritious food service with organized care services for enrolled participants. Payments will be

made to State agencies or FNS Regional Offices to enable them to reimburse institutions for food service to enrolled participants.

[53 FR 52587, Dec. 28, 1988, as amended by Amdt. 22, 55 FR 1377, Jan. 14, 1990]

## **§226.2 Definitions.**

*AFDC assistance unit* means any individual or group of individuals which is currently certified to receive assistance under the Aid to Families with Dependent Children Program in a State where the standard of eligibility for AFDC benefits does not exceed the income eligibility guidelines for free meals under this part.

*Act* means the National School Lunch Act, as amended.

*Administrative costs* means costs incurred by an institution related to planning, organizing, and managing a food service under the Program, and allowed by the State agency financial management instruction. These administrative costs may include administrative expenses associated with outreach and recruitment of unlicensed family or group day care homes and the allowable licensing-related expenses of such homes.

*Adult* means, for the purposes of the collection of social security numbers as a condition of eligibility for free or reduced-price meals, any individual 21 years of age or older.

*Adult day care center* means any public or private nonprofit organization or any proprietary title XIX or title XX center (as defined in this section) which (a) is licensed or approved by Federal, State or local authorities to provide nonresidential adult day care services to functionally impaired adults (as defined in this section) or persons 60 years of age or older in a group setting outside their homes or a group living arrangement on a less than 24-hour basis and (b) provides for such care and services directly or under arrangements made by the agency or organization whereby the agency or organization maintains professional management responsibility for all such services. Such centers shall provide a structured, comprehensive program that provides a variety of health, social and related support services to enrolled adult participants through an individual plan of care.

*Adult day care facility* means a licensed or approved adult day care center under the auspices of a sponsoring organization.

*Adult participant* means a person enrolled in an adult day care center who is functionally impaired (as defined in this section) or 60 years of age or older.

*Advanced payments* means financial assistance made available to an institution for its Program costs prior to the month in which such costs will be incurred.

*CACFP child care standards* means the Child and Adult Care Food Program child care standards developed by the Department for alternate approval of child care centers, outside-school-hours care centers, and day care homes by the State agency under the provisions of §226.6(d)(2) and (3).

*Child care center* means any public or private nonprofit organization, or any proprietary title XX center, as defined in this section ("Proprietary title XX center"), licensed or approved to provide nonresidential child care services to enrolled children, primarily of preschool age, including but not limited to day care centers, settlement houses, neighborhood centers, Head Start centers and organizations providing day care services for children with handicaps. Child care centers may participate in the Program as independent centers or under the auspices of a sponsoring organization.

*Child care facility* means a licensed or approved child care center, day care home, or outside-school-hours care center under the auspices of a sponsoring organization.

*Children* means (a) persons 12 years of age and under, (b) children of migrant workers 15 years of age and under, and (c) persons with mental or physical handicaps, as defined by the State, enrolled in an institution or a child care facility serving a majority of persons 18 years of age and under.

*Claiming percentage* means the ratio of the number of enrolled participants in an institution in each reimbursement category (free, reduced-price or paid) to the total of enrolled participants in the institution.

*Current income* means income received during the month prior to application for free or reduced-price meals. If such income does not accurately reflect the household's annual income, income shall be based on the projected annual household income. If the prior year's income provides an accurate reflection of the household's current annual income, the prior year may be used as a base for the projected annual income.

*Day care home* means an organized nonresidential child care program for children enrolled in a private home, licensed or approved as a family or group day care home and under the auspices of a sponsoring organization.

*Department* means the U.S. Department of Agriculture.

*Disclosure* means individual children's program eligibility information obtained through the free and reduced price meal eligibility process that is revealed or used for a purpose other than for the purpose for which the information was obtained. The term refers to access, release, or transfer of personal data about children by means of print, tape, microfilm, microfiche, electronic communication or any other means.

*Documentation* means:

(a) The completion of the following information on a free and reduced-price application:

(1) Names of all household members;

(2) Income received by each household member, identified by source of income (such as earnings, wages, welfare, pensions, support payments, unemployment compensation, social security and other cash income);

(3) The signature of an adult household member; and

(4) The social security number of the adult household member who signs the application, or an indication that he/she does not possess a social security number; or

(b) For a child who is a member of a food stamp or FDPIR household or an AFDC assistance unit, "documentation" means the completion of only the following information on a free and reduced price application:

(1) The name(s) and appropriate food stamp, FDPIR or AFDC case number(s) for the child(ren); and

(2) The signature of an adult member of the household; or

(c) For a child in a tier II day care home who is a member of a household participating in a Federally or State supported child care or other benefit program with an income eligibility limit that does not exceed the eligibility standard for free or reduced price meals:

(1) The name(s), appropriate case number(s) (if the program utilizes case numbers), and name(s) of the qualifying program(s) for the child(ren), and the signature of an adult member of the household; or

(2) If the sponsoring organization or day care home possesses it, official evidence of the household's participation in a qualifying program (submission of a free and reduced price application by the household is not required in this case); or

(d) For an adult participant who is a member of a food stamp or FDPIR household or is an SSI or Medicaid participant, as defined in this section, "documentation" means the completion of only the following information on a free and reduced price application:

(1) The name(s) and appropriate food stamp or FDPIR case number(s) for the participant(s) or the adult participant's SSI or Medicaid identification number, as defined in this section; and

(2) The signature of an adult member of the household; or

(e) For a child who is a Head Start participant, the Head Start statement of income eligibility issued upon initial enrollment in the Head Start Program or, if such statement is unavailable, other documentation from Head Start officials that the child's family meets the Head Start Program's low-income criteria.

*Enrolled child* means a child whose parent or guardian has submitted to an institution a signed document which indicates that the child is enrolled for child care. In addition, for the purposes of calculations made by sponsoring organizations of family day care homes in accordance with §§226.13(d)(3)(ii) and 226.13(d)(3)(iii), "enrolled child" (or "child in attendance") means a child whose parent or guardian has submitted a signed document which indicates that the child is enrolled for child care; who is present in the day care home for the purpose of child care; and who has eaten at least one meal during the claiming period.

*Enrolled participant* means an "Enrolled child" (as defined in this section) or "Adult participant" (as defined in this section).

*Expansion payments* means financial assistance made available to a sponsoring organization for its administrative expenses associated with expanding a food service program to day care homes located in low-income or rural areas. These expansion payments may include administrative expenses associated with outreach and recruitment of unlicensed family or group day care homes and the allowable licensing-related expenses of such homes.

*Family* means, in the case of children, a group of related or nonrelated individuals, who are not residents of an institution or boarding house, but who are living as one economic unit or, in the case of adult participants, the adult participant, and if residing with the adult participant, the spouse and dependent(s) of the adult participant.

*FDPIR household* means any individual or group of individuals which is currently certified to receive assistance as a household under the Food Distribution Program on Indian Reservations.

*Fiscal Year* means a period of 12 calendar months beginning October 1 of any year and ending with September 30 of the following year.

*FNS* means the Food and Nutrition Service of the Department.

*FNSRO* means the appropriate Regional Office of the Food and Nutrition Service.

*Food service equipment assistance* means Federal financial assistance formerly made available to State agencies to assist institutions in the purchase or rental of equipment to enable institutions to establish, maintain or expand food service under the Program.

*Food service management company* means an organization other than a public or private nonprofit school, with which an institution may contract for preparing and, unless otherwise provided for, delivering meals, with or without milk for use in the Program.

*Food Stamp household* means any individual or group of individuals which is currently certified to receive assistance as a household under the Food Stamp Program.

*Free meal* means a meal served under the Program to a participant from a family which meets the income standards for free school meals; or to a child who is automatically eligible for free meals by virtue of food stamp, FDPIR, or AFDC reciprocity; or to a child who is a Head Start participant; or to an adult participant who is automatically eligible for free meals by virtue of food stamp or FDPIR reciprocity or is a SSI or Medicaid participant. Regardless of whether the participant qualified for free meals by virtue of meeting one of the criteria of this definition, neither the participant nor any member of their family shall be required to pay or to work in the food service program in order to receive a free meal.

*Functionally impaired adult* means chronically impaired disabled persons 18 years of age or older, including victims of Alzheimer's disease and related disorders with neurological and organic brain dysfunction, who are physically or mentally impaired to the extent that their capacity for independence and their ability to carry out activities of daily living is markedly limited. Activities of daily living include, but are not limited to, adaptive activities such as cleaning, shopping, cooking, taking public transportation, maintaining a residence, caring appropriately for one's grooming or hygiene, using telephones and directories, or using a post office. Marked limitations refer to the severity of impairment, and not the number of limited activities, and occur when the degree of limitation is such as to seriously interfere with the ability to function independently.

*Group living arrangement* means residential communities which may or may not be subsidized by federal, State or local funds but which are private residences housing an individual or a group of individuals who are primarily responsible for their own care and who maintain a presence in the community but who may receive on-site monitoring.

*Household* means "family", as defined in §226.2 ("Family").

*Head Start participant* means a child currently receiving assistance under a Federally-funded Head Start Program who is categorically eligible for free meals in the CACFP by virtue of meeting Head Start's low-income criteria.

*Income standards* means the family-size and income standards prescribed annually by the Secretary for determining eligibility for free and reduced-price meals under the National School Lunch Program and the School Breakfast Program.

*Income to the program* means any funds used in an institution's food service program, including, but not limited to all monies, other than Program payments, received from other Federal, State, intermediate, or local government sources; participant's payments for meals and food service fees; income from any food sales to adults; and other income, including cash donations or grants from organizations or individuals.

*Independent center* means a child care center, outside-school-hours care center or adult day care center which enters into an agreement with the State agency to assume final administrative and financial responsibility for Program operations.

*Infant cereal* means any iron-fortified dry cereal specially formulated for and generally recognized as cereal for infants that is routinely mixed with breast milk or iron-fortified infant formula prior to consumption.

*Infant formula* means any iron-fortified formula intended for dietary use solely as a food for normal, healthy infants; excluding those formulas specifically formulated for infants with inborn errors of metabolism or digestive or absorptive problems. Infant formula, as served, must be in liquid state at recommended dilution.

*Institution* means a sponsoring organization, child care center, outside-school-hours care center or adult day care center which enters into an agreement with the State agency to assume final administrative and financial responsibility for Program operations.

*Key Element Reporting System (KERS)* means a comprehensive national system for reporting critical key element performance data on the operation of the program in institutions.

*Low-income area* means a geographical area in which at least 50 percent of the children are eligible for free or reduced price school meals under the National School Lunch Program and the School Breakfast Program, as determined in accordance with paragraphs (b) and (c), definition of tier I day care home.

*Meals* means food which is served to enrolled participants at an institution, child care facility or adult day care facility and which meets the nutritional requirements set forth in this part.

*Medicaid* means Title XIX of the Social Security Act.

*Medicaid participant* means an adult participant who receives assistance under title XIX of the Social Security Act, the Grant to States for Medical Assistance Programs -- Medicaid.

*Milk* means pasteurized fluid types of unflavored or flavored whole milk, lowfat milk, skim milk, or cultured buttermilk which meet State and local standards for such milk, except that, in the meal pattern for infants (0 to 1 year of age), milk means breast milk or iron-fortified infant formula. In Alaska, Hawaii, American Samoa, Guam, Puerto Rico, the Trust Territory of the Pacific Islands, the Northern Mariana Islands, and the Virgin Islands if a sufficient supply of such types of fluid milk cannot be obtained, "milk" shall include reconstituted or recombined milk. All milk should contain vitamins A and D at levels specified by the Food and Drug Administration and be consistent with State and local standards for such milk.

*Nonpricing program* means an institution in which there is no separate identifiable charge made for meals served to participants.

*Nonprofit food service* means all food service operations conducted by the institution principally for the benefit of enrolled participants, from which all of the Program reimbursement funds are used solely for the operations or improvement of such food service.

*Nonresidential* means that the same participants are not maintained in care for more than 24 hours on a regular basis.

*OIG* means the Office of the Inspector General of the Department.

*Operating costs* means expenses incurred by an institution in serving meals to participants under the Program, and allowed by the State agency financial management instruction.

*Outside-school-hours care center* means a public or private nonprofit organization, or a proprietary title XX center, as defined in this section ("Proprietary title XX center"), licensed or approved to provide organized nonresidential child care services to enrolled children outside of school hours. Outside-school-hours care centers may participate in the Program as independent centers or under the auspices of a sponsoring organization.

*Participants* means "Children" or "Adult participants" as defined in this section.

*Personal property* means property of any kind except real property. It may be tangible -- having physical existence -- or intangible -- having no physical existence such as patents, inventions, and copyrights.

*Pricing program* means an institution in which a separate identifiable charge is made for meals served to participants.

*Program* means the Child and Adult Care Food Program authorized by section 17 of the National School Lunch Act, as amended.

*Program payments* means financial assistance in the form of start-up payments, expansion payments, advance payments, or reimbursement paid or payable to institutions for operating costs and administrative costs.

*Proprietary title XIX center* means any private, for profit center (a) providing nonresidential adult day care services for which it receives compensation from amounts granted to the States under title XIX of the Social Security Act and (b) in which title XIX beneficiaries were not less than 25 percent of enrolled eligible participants in the calendar month preceding initial application or annual reapplication for Program participation.

*Proprietary title XX center* means any private, for profit center:

(a) Providing nonresidential child care services for which it receives compensation from amounts granted to the States under title XX of the Social Security Act, and in which title XX child care beneficiaries constitute no less than 25 percent of enrolled eligible participants or licensed capacity, whichever is less, during the calendar month preceding initial application or annual reapplication for Program participation; or,

(b) Providing nonresidential adult day care services for which it receives compensation from amounts granted to the States under title XX of the Social Security Act and in which adult beneficiaries were not less than 25 percent of enrolled eligible participants during the calendar month preceding initial application or annual reapplication for Program participation.

*Reduced-price meal* means a meal served under the Program to a participant from a family which meets the income standards for reduced-price school meals. Any separate charge imposed shall be less than the full price of the meal, but in no case more than 40 cents for a lunch or supper, 30 cents for a breakfast, and 15 cents for a supplement, and for which neither the participant nor any member of his family is required to work in the food service program.

*Reimbursement* means Federal financial assistance paid or payable to institutions for Program costs within the rates assigned by the State agency.

*Rural area* means any geographical area in a county which is not a part of a Metropolitan Statistical Area or any "pocket" within a Metropolitan Statistical Area which, at the option of the State agency and with FNSRO concurrence, is determined to be geographically isolated from urban areas.

*SSI participant* means an adult participant who receives assistance under title XVI of the Social Security Act, the Supplemental Security Income (SSI) for the Aged, Blind and Disabled Program.

*School year* means a period of 12 calendar months beginning July 1 of any year and ending June 30 of the following year.

*Sponsoring organization* means a public or nonprofit private organization which is entirely responsible for the administration of the food program in: (a) One or more day care homes; (b) a child care center, outside-school-hours care centers, or adult day care center which is a legally distinct entity from the sponsoring organization; (c) two or more child care centers, outside-school-hours care centers, or adult day care centers; or (d) any combination of child care centers, adult day care centers, day care homes, and outside-school-hours care centers. The term "sponsoring organization" also includes a for-profit organization which is entirely responsible for administration of the Program in any combination of two or more child care centers, adult day care centers and outside-school-hours care centers which are part of the same legal entity as the sponsoring organization, and which are proprietary title XIX or XX centers, as defined in this section ("Proprietary Title XIX center", "Proprietary Title XX center").

*Start-up payments* means financial assistance made available to a sponsoring organization for its administrative expenses associated with developing or expanding a food service program in day care homes and initiating successful Program operations. These start-up payments may include administrative expenses associated with outreach and recruitment of unlicensed family or group day care homes and the allowable licensing-related expenses of such homes.

*State* means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands.

*State agency* means the State educational agency or any other State agency that has been designated by the Governor or other appropriate executive, or by the legislative authority of the State, and has been approved by the Department to administer the Program within the State or in States in which FNS administers the Program, FNSRO. This also may include a State agency other than the existing CACFP State Agency, when such agency is designated by the Governor of the State to administer only the adult day care component of the CACFP.

*State Children's Health Insurance Program (SCHIP)* means the State medical assistance program under title XXI of the Social Security Act ( 42 U.S.C. 1397aa et seq.).

*Tier I day care home* means (a) a day care home that is operated by a provider whose household meets the income standards for free or reduced-price meals, as determined by the sponsoring organization based on a completed free and reduced price application, and whose income is verified by the sponsoring organization of the home in accordance with §226.23(h)(6); (b) A day care home that is located in an area served by a school enrolling elementary students in which at least 50 percent of the total number of children enrolled are certified eligible to receive free or reduced price meals; or (c) A day care home that is located in a geographic area, as defined by FNS based on census data, in which at least 50 percent of the children residing in the area are members of households which meet the income standards for free or reduced price meals.

*Tier II day care home* means a day care home that does not meet the criteria for a *Tier I day care home*.

*Title XVI* means Title XVI of the Social Security Act which authorizes the Supplemental Security Income for the Aged, Blind, and Disabled Program -- SSI.

*Title XIX* means Title XIX of the Social Security Act which authorizes the Grants to States for Medical Assistance Programs -- Medicaid.

*Title XX* means Title XX of the Social Security Act.

*Uniform Federal Assistance Regulations* means the Department's regulations, 7 CFR part 3015, establishing Department-wide policies and standards for administration of grants and cooperative agreements.

*Verification* means a review of the information reported by institutions to the State agency regarding the eligibility of participants for free or reduced-price meals, and, in addition, for a pricing program, confirmation of eligibility for free or reduced-price benefits under the program. Verification for a pricing program shall include confirmation of income eligibility and, at State discretion, any other information required on the application which is defined as documentation in §226.2. Such verification may be accomplished by examining information (e.g., wage stubs, etc.) provided by the household or other sources of information as specified in §226.23(h)(2)(iv). However, if a food stamp, FDPIR or AFDC case number is provided for a child, verification for such child shall include only confirmation that the child is included in a currently certified food stamp or FDPIR household or AFDC assistance unit. If a Head Start statement of income

eligibility is provided for a child, verification for such child shall include only confirmation that the child is a Head Start participant. For an adult participant, if a food stamp or FDPIR case number or SSI or Medicaid assistance identification number is provided, verification for such participant shall include only confirmation that the participant is included in a currently certified food stamp or FDPIR household or is a current SSI or Medicaid participant.

*Yogurt* means commercially coagulated milk products obtained by the fermentation of specific bacteria, that meet milk fat or milk solid requirements to which flavoring foods or ingredients may be added. These products are covered by the Food and Drug Administration's Standard of Identity for yogurt, lowfat yogurt, and nonfat yogurt, (21 CFR 131.200), (21 CFR 131.203), (21 CFR 131.206), respectively.

[47 FR 36527, Aug. 20, 1982; 47 FR 46072, Oct. 15, 1982, as amended at 48 FR 21529, May 13, 1983; 48 FR 41142, Sept. 14, 1983; 50 FR 19310, May 8, 1985; 51 FR 31316, Sept. 3, 1986; 52 FR 36906, Oct. 2, 1987; 53 FR 52587, Dec. 28, 1988; 54 FR 27153, June 28, 1989; Amdt. 22, 55 FR 1377, Jan. 14, 1990; 61 FR 25554, May 22, 1996; 62 FR 901, Jan. 7, 1997; 62 FR 23617, May 1, 1997; 63 FR 9104, Feb. 24, 1998; 63 FR 9727, Feb. 26, 1998; 64 FR 61775, Nov. 15, 1999; 66 FR 2203, Jan. 11, 2001]

### **§226.3 Administration.**

(a) Within the Department, FNS shall act on behalf of the Department in the administration of the Program.

(b) Within the States, responsibility for the administration of the Program shall be in the State agency, except that if FNS has continuously administered the Program in any State since October 1, 1980, FNS shall continue to administer the Program in that State. A State in which FNS administers the Program may, upon request to FNS, assume administration of the Program.

(c) Each State agency desiring to take part in the Program shall enter into a written agreement with the Department for the administration of the Program in the State in accordance with the provisions of this part. This agreement shall cover the operation of the Program during the period specified therein and may be extended by consent of both parties.

(d) FNSRO shall, in each State in which it administers the Program, have available all funds and assume all responsibilities of a State agency as set forth in this part.

## **Subpart B -- Assistance to States**

### **§226.4 Payments to States and use of funds.**

(a) *Availability of funds.* For each fiscal year based on funds provided to the Department, FNS shall make funds available to each State agency to reimburse institutions for their costs in connection with food service operations, including administrative expenses, under this part. Funds shall be made available in an amount no less than the sum of the totals obtained under paragraphs (b), (c), (d), (e) and (h) of this section. However, in any fiscal year, the aggregate amount of assistance provided to a State under this part shall not exceed the sum of the Federal funds provided by the State to participating institutions within the State for that fiscal year and any funds used by the State under paragraphs (h) and (j) of this section.

(b) *Center funds.* For meals served to participants in child care centers, adult day care centers and outside-school-hours care centers, funds shall be made available to each State agency in an amount no less than the sum of the products obtained by multiplying:

(1) The number of breakfasts served in the Program within the State to participants from families that do not satisfy the eligibility standards for free and reduced-price school meals enrolled in institutions by the national average payment rate for breakfasts for such participants under section 4 of the Child Nutrition Act of 1966;

(2) The number of breakfasts served in the Program within the State to participants from families that satisfy the eligibility standards for free school meals enrolled in institutions by the national average payment rate for free breakfasts under section 4 of the Child Nutrition Act of 1966;

(3) The number of breakfasts served to participants from families that satisfy the eligibility standard for reduced-price school meals enrolled in institutions by the national average payment rate for reduced-price school breakfasts under section 4 of the Child Nutrition Act of 1966;

(4) The number of lunches and suppers served in the Program within the State by the national average payment rate for lunches under section 4 of the National School Lunch Act. (All lunches and suppers served in the State are funded under this provision);

(5) The number of lunches and suppers served in the Program within the State to participants from families that satisfy the eligibility standard for free school meals enrolled in institutions by the national average payment rate for free lunches under section 11 of the National School Lunch Act;

(6) The number of lunches and suppers served in the Program within the State to participants from families that satisfy the eligibility standard for reduced-price school meals enrolled in institutions by the national average payment rate for reduced-price lunches under section 11 of the National School Lunch Act;

(7) The number of supplements served in the Program within the State to participants from families that do not satisfy the eligibility standards for free and reduced-price school meals enrolled in institutions by 2.75 cents;

(8) The number of supplements served in the Program within the State to participants from families that satisfy the eligibility standard for free school meals enrolled in institutions by 30 cents;

(9) The number of supplements served in the Program within the State to participants from families that satisfy the eligibility standard for reduced-price school meals enrolled in institutions by 15 cents.

(c) *Day care home funds.* For meals served to children in day care homes, funds shall be made available to each State agency in an amount no less than the sum of products obtained by multiplying:

(1) The number of breakfasts served in the Program within the State to children enrolled in tier I day care homes by the current tier I day care home rate for breakfasts;

(2) The number of breakfasts served in the Program within the State to children enrolled in tier II day care homes that have been determined eligible for free or reduced price meals by the current tier I day care home rate for breakfasts;

(3) The number of breakfasts served in the Program within the State to children enrolled in tier II day care homes that do not satisfy the eligibility standards for free or reduced price meals, or to children from whose households applications were not collected, by the current tier II day care home rate for breakfasts;

- (4) The number of lunches and suppers served in the Program within the State to children enrolled in tier I day care homes by the current tier I day care home rate for lunches/suppers;
  - (5) The number of lunches and suppers served in the Program within the State to children enrolled in tier II day care homes that have been determined eligible for free or reduced price meals by the current tier I day care home rate for lunches/suppers;
  - (6) The number of lunches and suppers served in the Program within the State to children enrolled in tier II day care homes that do not satisfy the eligibility standards for free or reduced price meals, or to children from whose households applications were not collected, by the current tier II day care home rate for lunches/suppers;
  - (7) The number of supplements served in the Program within the State to children enrolled in tier I day care homes by the current tier I day care home rate for supplements;
  - (8) The number of supplements served in the Program within the State to children enrolled in tier II day care homes that have been determined eligible for free or reduced price meals by the current tier I day care home rate for supplements; and
  - (9) The number of supplements served in the Program within the State to children enrolled in tier II day care homes that do not satisfy the eligibility standards for free or reduced price meals, or to children from whose households applications were not collected, by the current tier II day care home rate for supplements.
- (d) *Administrative funds.* For administrative payments to day care home sponsoring organizations, funds shall be made available to each State agency in an amount not less than the product obtained each month by multiplying the number of day care homes participating under each sponsoring organization within the State by the applicable rates specified in §226.12(a)(3).
- (e) *Start-up and expansion funds.* For start-up and expansion payments to eligible sponsoring organizations, funds shall be made available to each State agency in an amount equal to the total amount of start-up and expansion payments made in the most recent period for which reports are available for that State or on the basis of estimates by FNS.
- (f) *Funding assurance.* FNS shall ensure that, to the extent funds are appropriated, each State has sufficient Program funds available for providing start-up, expansion and advance payments in accordance with this part.
- (g) *Rate adjustments.* FNS shall publish a notice in the FEDERAL REGISTER to announce each rate adjustment. FNS shall adjust the following rates on the specified dates:
- (1) The rates for meals served in tier I and tier II day care homes shall be adjusted annually, on July 1 (beginning July 1, 1997), on the basis of changes in the series for food at home of the Consumer Price Index for All Urban Consumers published by the Department of Labor. Such adjustments shall be rounded to the nearest lower cent based on changes measured over the most recent twelve-month period for which data are available. The adjustments shall be computed using the unrounded rate in effect for the preceding school year.
  - (2) The rate for supplements served in child care centers, adult day care centers and outside-school-hours care centers shall be adjusted annually, on July 1, on the basis of changes in the series for food away from home of the Consumer Price Index for All Urban Consumers published by the Department of Labor. Such adjustments shall be made to the nearest \$.0025 based on changes measured over the most recent twelve-month period for which data are available.
  - (3) The rate for administrative payments to day care home sponsoring organizations shall be adjusted annually, on July 1, on the basis of changes in the series for all items of the Consumer Price Index for All Urban Consumers published by the Department of Labor. Such adjustments

shall be made to the nearest dollar based on changes measured over the most recent twelve-month period for which data are available.

(h) *Audit funds.* For the expense of conducting audits and reviews under §226.8, funds shall be made available to each State agency in an amount equal to two percent of the Program reimbursement provided to institutions within the State during the second fiscal year preceding the fiscal year for which these funds are to be made available. The amount of assistance provided to a State under this paragraph in any fiscal year may not exceed the State's expenditures under §226.8 during such fiscal year.

(i) *Method of funding.* FNS shall authorize funds for State agencies in accordance with the Uniform Federal Assistance Regulations.

(j) *Special developmental projects.* The State agency may use in carrying out special developmental projects an amount not to exceed one percent of Program funds used in the second prior fiscal year. Special developmental projects shall conform to FNS guidance and be approved in writing by FNS.

[47 FR 36527, Aug. 20, 1982, as amended at 52 FR 36906, Oct. 2, 1987; 53 FR 52588, Dec. 28, 1988; 62 FR 902, Jan. 7, 1997; 63 FR 9728, Feb. 26, 1998]

#### **§226.5 Donation of commodities.**

(a) USDA foods available under section 6 of this Act, section 416 of the Agricultural Act of 1949 (7 U.S.C. 1431) or purchased under section 32 of the Act of August 24, 1935 (7 U.S.C. 1431), section 709 of the Food and Agriculture Act of 1965 (7 U.S.C. 1446a-1), or other authority, and donated by the Department shall be made available to each State.

(b) The value of such commodities donated to each State for each school year shall be, at a minimum, the amount obtained by multiplying the number of reimbursable lunches and suppers served in participating institutions in that State during the preceding school year by the rate for commodities established under section 6(e) of the Act for the current school year. Adjustments shall be made at the end of each school year to reflect the difference between the number of reimbursable lunches and suppers served during the preceding year and the number served during the current year, and subsequent commodity entitlement shall be based on the adjusted meal counts. At the discretion of FNS, current-year adjustments may be made for significant variations in the number of reimbursable meals served. Such current-year adjustments will not be routine and will only be made for unusual problems encountered in a State, such as a disaster that necessitates institutional closures for a prolonged period of time. CACFP State agencies electing to receive cash-in-lieu of commodities will receive payments based on the number of reimbursable meals actually served during the current school year.

[47 FR 36527, Aug. 20, 1982, as amended at 62 FR 23618, May 1, 1997]

### **Subpart C -- State Agency Provisions**

**§226.6 State agency administrative responsibilities.**

(a) *State agency personnel.* Each State agency shall provide sufficient consultative, technical and managerial personnel to administer the Program, provide sufficient training and technical assistance to institutions and monitor performance to facilitate expansion and effective operation of the Program.

(b) *Application approval.* Each State agency shall establish an application procedure to determine the eligibility under this part of applicant institutions, and facilities for which applications are submitted by sponsoring organizations. State agencies, by written consent of the State agency and the institutions, shall renew agreements with institutions not less frequently than annually. A State agency may not execute an agreement to be effective during two fiscal years but may nevertheless establish an ongoing renewal process for the purpose of reviewing and approving applications from participating institutions throughout the fiscal year. As a minimum, such application approval process shall include:

- (1) Renewal of the Program agreement;
- (2) For child care centers, adult day care centers and outside-school-hours care centers, submission of current eligibility information on enrolled participants.
- (3) For sponsoring organizations of day care homes, submission of the current total number of children enrolled, and an assurance that day care home providers' children enrolled in the Program are eligible for free or reduced-price meals;
- (4) Issuance of a nondiscrimination policy statement and media release;
- (5) For sponsoring organizations, submission of a management plan;
- (6) Submission of an administrative budget;
- (7) Submission of documentation that all child care centers, adult day care centers, outside-school-hours care centers, and day care homes for which application is made are in compliance with Program licensing/approval provisions;
- (8) For proprietary title XX child care centers, submission of documentation that they are currently providing nonresidential day care services for which they receive compensation under title XX of the Social Security Act, and certification that not less than 25 percent of enrolled children or 25 percent of licensed capacity, whichever number is less, in each such center during the most recent calendar month were title XX beneficiaries. In the case of title XIX or title XX adult day care centers, submission of documentation that they are currently providing nonresidential day care services for which they receive compensation under title XIX or title XX of the Social Security Act, and certification that not less than 25 percent of enrolled adult participants in each such center during the most recent calendar month were title XIX or title XX beneficiaries;
- (9) Statement of institutional preference to receive commodities or cash-in-lieu of commodities;
- (10) Institutional choice to receive all, part, or none of advance payment. Any institution applying for participation in the Program shall be notified of approval or disapproval by the State agency in writing within 30 calendar days of filing a complete and correct application. If an institution submits an incomplete application, the State agency shall notify the institution within 15 calendar days of receipt of the application and shall provide technical assistance, if necessary, to the institution for the purpose of completing its application. Any disapproved applicant shall be notified of its right to appeal under paragraph (j) of this section.

(c) *Denial of applications and termination of institutions.* The State agency shall not enter into an agreement with any applicant institution which the State agency determines to have been seriously deficient at any time in its operation of any Federal child nutrition program. However, the State agency may enter into an agreement with such an institution when with FNS concurrence it determines that the deficiencies have been corrected. The State agency shall terminate the program agreement with any institution which it determines to be seriously deficient. However, the State agency shall afford an institution every reasonable opportunity to correct problems before terminating the institution for being seriously deficient. The State agency shall notify FNS whenever it has denied an application from or terminated the participation of a seriously deficient institution. This notification shall be made within 15 days of the review official's decision upholding the State's action or, if the institution elects not to appeal the decision, within 15 days of the expiration of the appeal right. FNS will maintain a list of these institutions and will notify all other State agencies of these institutions' ineligibility to participate in the program. FNS may determine independently that an institution has been seriously deficient in its operation of any Federal child nutrition program and include such institution on the list of ineligible institutions if appropriate corrective action is not taken. State agencies shall not enter into an agreement with any institution included on this list of ineligible institutions and shall terminate any participating institution included on the list within 30 days of the receipt of notification by FNS of the institution's ineligible status. Once included on this list, an institution shall be ineligible to participate in the program until such time as FNS, in consultation with the appropriate State agency, determines that the serious deficiency which resulted in the ineligible status has been corrected. Any institution which is identifiable with a seriously deficient institution through its corporate organization, officers, employees, or otherwise shall also be considered to be ineligible unless it is demonstrated to the satisfaction of the State agency, with FNS concurrence, that good cause exists for considering the institution distinct from the seriously deficient institution. Denial or termination actions taken on the basis of FNS notification of ineligible status shall not be subject to administrative review as provided in §226.6(k). However, an institution which FNS has determined to be seriously deficient and which has not taken acceptable corrective action may request an administrative review of this determination by an FNS review official in accordance with the appeal procedures set forth in §226.6(k) and will not be included on the list of ineligible institutions unless FNS' determination is upheld by the review official. Serious deficiencies, which are grounds for disapproval of applications and for termination include, but are not limited to, any of the following:

- (1) Noncompliance with the applicable bid procedures and contract requirements of Federal child nutrition program regulations;
- (2) The submission of false information to the State agency;
- (3) Failure to return to the State agency any advance payments which exceeded the amount earned for serving eligible meals, or failure to return disallowed start-up or expansion payments;
- (4) Failure to maintain adequate records;
- (5) Failure to adjust meal orders to conform to variations in the number of participants;
- (6) The claiming of Program payments for meals not served to participants;
- (7) Service of a significant number of meals which did not include required quantities of all meal components;
- (8) Continued use of food service management companies that are in violation of health codes;
- (9) Failure of a sponsoring organization to disburse payments to its facilities in accordance with its management plan;

(10) A history of administrative or financial mismanagement in any Federal child nutrition program;

(11) The claiming of Program payment for meals served by a proprietary title XX child care center during a calendar month in which less than 25 percent of enrolled children or 25 percent of licensed capacity, whichever number is less, were title XX beneficiaries. In the case of an adult day care center, the claiming of Program payment for meals served by a proprietary title XIX or title XX center during a calendar month in which less than 25 percent of enrolled adult participants were title XIX or title XX beneficiaries.

(d) *Licensing/approval for child care centers, outside-school-hours care centers and day care homes.* This section prescribes State agency responsibilities to ensure that child care centers and day care homes meet the licensing/approval criteria set forth in this part. Sponsoring organizations shall submit to the State agency documentation that facilities under their jurisdiction are in compliance with licensing/approval requirements. Independent centers shall submit such documentation to the State agency on their own behalf.

(1) *General.* Each State agency shall establish procedures to annually review information submitted by institutions to ensure that all participating child care centers, day care homes, and outside-school-hours care centers either:

- (i) Are licensed or approved by Federal, State, or local authorities, provided that institutions which are approved for Federal programs on the basis of State or local licensing shall not be eligible for the Program if their licenses lapse or are terminated; or
- (ii) Are complying with applicable procedures to renew licensing or approval in situations where the State agency has no information that licensing or approval will be denied; or
- (iii) Receive Title XX funds for providing child care, if licensing or approval is not available; or
- (iv) Demonstrate compliance with applicable State or local child care standards to the State agency, if licensing is not available and title XX funds are not received; or
- (v) Demonstrate compliance with CACFP child care standards to the State agency, if licensing or approval is not available and Title XX funds are not received.

(2) *CACFP child care standards.* (i) When licensing or approval is not available, independent child care centers, and sponsoring organizations on behalf of their child care centers or day care homes, may elect to demonstrate compliance, annually, with the following CACFP child care standards or other standards specified in paragraph (d)(3) of this section:

(A) *Staff/child ratios.* (1) Day care homes provide care for no more than 12 children at any one time. One home caregiver is responsible for no more than 6 children ages 3 and above, or no more than 5 children ages 0 and above. No more than 2 children under the age of 3 are in the care of 1 caregiver. The home provider's own children who are in care and under the age of 14 are counted in the maximum ratios of caregivers to children.

(2) Child care centers and outside-school-hours care centers do not fall below the following staff/child ratios:

- (i) For children under 6 weeks of age -- 1:1
- (ii) For children ages 6 weeks up to 3 years -- 1:4
- (iii) For children ages 3 years up to 6 years -- 1:6
- (iv) For children ages 6 years up to 10 years -- 1:15
- (v) For children ages 10 and above -- 1:20

(B) *Nondiscrimination.* Day care services are available without discrimination on the basis of race, color, national origin, sex, age, or handicap.

(C) *Safety and sanitation.* (1) A current health/sanitation permit or satisfactory report of an inspection conducted by local authorities within the past 12 months shall be submitted.

(2) A current fire/building safety permit or satisfactory report of an inspection conducted by local authorities within the past 12 months shall be submitted.

(3) Fire drills are held in accordance with local fire/building safety requirements.

(D) *Suitability of facilities.* (1) Ventilation, temperature, and lighting are adequate for children's safety and comfort.

(2) Floors and walls are cleaned and maintained in a condition safe for children.

(3) Space and equipment, including rest arrangements for preschool age children, are adequate for the number of age range of participating children.

(E) *Social services.* Independent centers, and sponsoring organizations in coordination with their facilities, have procedures for referring families of children in care to appropriate local health and social service agencies.

(F) *Health services.* (1) Each child is observed daily for indications of difficulties in social adjustment, illness, neglect, and abuse, and appropriate action is initiated.

(2) A procedure is established to ensure prompt notification of the parent or guardian in the event of a child's illness or injury, and to ensure prompt medical treatment in case of emergency.

(3) Health records, including records of medical examinations and immunizations, are maintained for each enrolled child. (Not applicable to day care homes.)

(4) At least one full-time staff member is currently qualified in first aid, including artificial respiration techniques. (Not applicable to day care homes.)

(5) First aid supplies are available.

(6) Staff members undergo initial and periodic health assessments.

(G) *Staff training.* The institution provides for orientation and ongoing training in child care for all caregivers.

(H) *Parental involvement.* Parents are afforded the opportunity to observe their children in day care.

(I) *Self-evaluation.* The institution has established a procedure for periodic self-evaluation on the basis of CACFP child care standards.

(ii) When licensing or approval is not available, independent outside-school-hours care centers, and sponsoring organizations on behalf of their outside-school-hours care centers, may elect to demonstrate compliance with child care standards developed by the State agency which shall include, as a minimum, information on: (A) Fire/safety, (B) sanitation, (C) organized activities, (D) kitchen and restroom facilities, (E) appropriateness of games and materials, (F) availability of emergency medical care, and (G) child-staff ratios as indicated in §226.6(d)(2)(i)(A). For items (A) and (B), of this paragraph, appropriate State or local permits are required.

(3) *Alternate approval procedures.* Each State agency shall establish procedures to review information submitted by institutions for centers or homes for which licensing or approval is not available in order to establish eligibility for the Program. Licensing or approval is not available when (i) no Federal, State, or local licensing/approval standards have been established for child care centers, outside-school-hours care centers, or day care homes; or (ii) no mechanism exists to determine compliance with licensing/approval standards. In these situations, independent centers, and sponsoring organizations on behalf of their facilities, may choose to demonstrate compliance with either CACFP child care standards, applicable State child care standards, or applicable local child care standards. State agencies shall provide information about applicable State child care standards and CACFP child care standards to institutions, but may require institutions electing to

demonstrate compliance with applicable local child care standards to identify and submit these standards. The State agency may permit independent centers, and sponsoring organizations on behalf of their facilities, to submit self-certification forms, and may grant approval without first conducting a compliance review at the center or facility. But the State agency shall require submission of health/sanitation and fire/safety permits or certificates for all independent centers and facilities seeking alternate child care standards approval. Compliance with applicable child care standards are subject to review in accordance with §226.6(n).

(e) *Licensing/approval for adult day care centers.* This paragraph prescribes State agency responsibilities to ensure that adult day care centers meet the licensing/approval criteria set forth in this part. Sponsoring organizations shall submit to the State agency documentation that facilities under their jurisdiction are in compliance with licensing/approval requirements. Independent adult day care centers shall submit such documentation to the State agency on their own behalf. Each State agency shall establish procedures to annually review information submitted by institutions to ensure that all participating adult day care centers either:

(1) Are licensed or approved by Federal, State or local authorities, provided that institutions which are approved for Federal programs on the basis of State or local licensing shall not be eligible for the Program if their licenses lapse or are terminated; or

(2) Are complying with applicable procedures to renew licensing or approval in situations where the State agency has no information that licensing or approval will be denied.

(f) *Annual requirements.* State agencies shall require institutions to comply with applicable provisions of this part. Each State agency shall annually:

(1) Enter into and execute a written Program agreement with each institution, or renew such agreement with the written concurrence of the institution. The Program agreement shall provide that the institution shall accept final financial and administrative responsibility for management of an effective food service, comply with all requirements under this part, and comply with all requirements of title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975 and the Department's regulations concerning nondiscrimination (7 CFR parts 15, 15a and 15b), including requirements for racial and ethnic participation data collection, public notification of the nondiscrimination policy, and reviews to assure compliance with such policy, to the end that no person shall, on the grounds of race, color, national origin, sex, age, or handicap be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under the Program.

(2) Require each sponsoring organization to submit a management plan with its application for review and approval. Such a plan shall include: detailed information on the organizational administrative structure; the staff assigned to Program management and monitoring; administrative budget; procedures which will be used by the sponsoring organization to administer the Program in and disburse payments to the child care facilities under its jurisdiction; and, for sponsoring organizations of day care homes, a description of the system for making tier I day care home determinations, and a description of the system of notifying tier II day care homes of their options for reimbursement. For initial implementation of the two-tiered reimbursement structure for day care homes, by April 1, 1997, each sponsoring organization of day care homes shall submit an amendment to its plan, subject to review and approval by the State agency, describing its systems for making tier I day care home determinations and for notifying tier II day care homes of their options for reimbursement.

- (3) Require each institution to submit an administrative budget. Each sponsoring organization shall be required to incorporate this budget into its management plan.
- (4) Determine that all meal procurements with food service management companies are in conformance with the bid and contractual requirements of §226.22.
- (5) Inquire as to the preference of institutions for commodities or cash-in-lieu of commodities.
- (6) Provide institutions with information on foods available in plentiful supply, based on information provided by the Department.
- (7) Inform institutions with separate meal charges of their responsibility to ensure that free and reduced-price meals are served to participants unable to pay the full price and provide to all institutions a copy of the income standards to be used by institutions for determining the eligibility of participants for free and reduced-price meals under the Program.
- (8) Perform verification of the eligibility of participants for free and reduced-price meals in participating institutions in accordance with the procedures outlined in §226.23(h). State agencies verifying the information on free and reduced-price applications shall ensure that verification activities are applied without regard to race, color, national origin, sex, age, or handicap.
- (9) Coordinate with the State agency which administers the National School Lunch Program to ensure the receipt of a list of elementary schools in the State in which at least one-half of the children enrolled are certified eligible to receive free or reduced price meals. The State agency shall provide the list to sponsoring organizations by April 1, 1997, and by February 15 of each year thereafter, unless the State agency that administers the National School Lunch Program has elected to base data for the list on a month other than October, in which case the State agency shall provide the list to sponsoring organizations within 15 calendar days of its receipt from the State agency that administers the National School Lunch Program. The State agency also shall provide each sponsoring organization with census data, as provided to the State agency by FNS upon its availability on a decennial basis, showing areas in the State in which at least 50 percent of the children are from households meeting the income standards for free or reduced price meals. In addition, the State agency shall ensure that the most recent available data is used if the determination of a day care home's eligibility as a tier I day care home is made using school or census data. Determinations of a day care home's eligibility as a tier I day care home shall be valid for one year if based on a provider's household income, three years if based on school data, or until more current data are available if based on census data. However, a sponsoring organization, the State agency, or FNS may change the determination if information becomes available indicating that a home is no longer in a qualified area. The State agency shall not routinely require annual redeterminations of the tiering status of tier I day care homes based on updated elementary school data.
- (10) Provide all sponsoring organizations of day care homes in the State with a listing of State-funded programs, participation in which by a parent or child will qualify a meal served to a child in a tier II home for the tier I rate of reimbursement.
- (11) Require each sponsoring organization of day care homes to submit the total number of tier I and tier II day care homes that it sponsors; a breakdown showing the total number of children enrolled in tier I day care homes; the total number of children enrolled in tier II day care homes; and the number of children in tier II day care homes that have been identified as eligible for free or reduced price meals.
- (g) *Program expansion.* Each State agency shall take action to expand the availability of benefits under this Program. At a minimum, the State shall annually notify each nonparticipating child

care center, outside-school-hours care center, and day care home within the State that is licensed, approved, registered, or receiving funds under title XX and each nonparticipating adult day care center that is licensed or approved, of the availability of the Program, the requirements for Program participation, and the application procedures to be followed in the Program. The State agency shall make the list of child care centers, adult day care centers, outside-school-hours care centers, and day care homes notified each year available to the public upon request.

(h) *Commodity distribution.* The State shall annually inquire as to the preference of each institution for commodities or cash-in-lieu of commodities. Each institution electing cash-in-lieu of commodities shall receive such payments. Each institution which elects to receive commodities shall have commodities provided to it unless the State agency, after consultation with the State commodity distribution agency, demonstrates to FNS that distribution of commodities to the number of such institutions would be impracticable. The State agency may then, with the concurrence of FNS, provide cash-in-lieu of commodities for all institutions. A State agency request for cash-in-lieu of all commodities shall be submitted to FNS not later than May 1 of the school year preceding the school year for which the request is made. The State agency shall, by June 1 of each year, submit a list of institutions which have elected to receive commodities to the State commodity distribution agency, unless FNS has approved a request for cash-in-lieu of commodities for all institutions. The list shall be accompanied by information on the average daily number of lunches and suppers to be served to participants by each such institution.

(i) *Standard contract.* Each State agency shall develop a standard contract in accordance with §226.21 and provide for its use between institutions and food service management companies. The contract shall expressly and without exception stipulate:

(1) The institution shall provide the food service management company with a list of the State agency approved child care centers, day care homes, adult day care centers, and outside-school-hours care centers to be furnished meals by the food service management company, and the number of meals, by type, to be delivered to each location;

(2) The food service management company shall maintain such records (supported by invoices, receipts or other evidence) as the institution will need to meet its responsibilities under this part, and shall promptly submit invoices and delivery reports to the institution no less frequently than monthly;

(3) The food service management company shall have Federal, State or local health certification for the plant in which it proposes to prepare meals for use in the Program, and it shall ensure that health and sanitation requirements are met at all times. In addition, the State agency may require the food service management company to provide for meals which it prepares to be periodically inspected by the local health department or an independent agency to determine bacteria levels in the meals being prepared. These bacteria levels shall conform to the standards which are applied by the local health authority with respect to the level of bacteria which may be present in meals prepared or served by other establishments in the locality. Results of these inspections shall be submitted to the institution and to the State agency;

(4) The meals served under the contract shall conform to the cycle menus upon which the bid was based, and to menu changes agreed upon by the institution and food service management company;

(5) The books and records of the food service management company pertaining to the institution's food service operation shall be available for inspection and audit by representatives of the State agency, of the Department, and of the U.S. General Accounting Office at any

reasonable time and place, for a period of 3 years from the date of receipt of final payment under the contract, or in cases where an audit requested by the State agency or the Department remains unresolved, until such time as the audit is resolved;

(6) The food service management company shall operate in accordance with current Program regulations;

(7) The food service management company shall not be paid for meals which are delivered outside of the agreed upon delivery time, are spoiled or unwholesome at the time of delivery, or do not otherwise meet the meal requirements contained in the contract;

(8) Meals shall be delivered in accordance with a delivery schedule prescribed in the contract;

(9) Increases and decreases in the number of meal orders may be made by the institution, as needed, within a prior notice period mutually agreed upon in the contract;

(10) All meals served under the Program shall meet the requirements of §226.20;

(11) All breakfasts, lunches, and suppers delivered for service in outside-school-hours care centers shall be unitized, with or without milk, unless the State agency determines that unitization would impair the effectiveness of food service operations. For meals delivered to child care centers and day care homes, the State agency may require unitization, with or without milk, of all breakfasts, lunches, and suppers only if the State agency has evidence which indicates that this requirement is necessary to ensure compliance with §226.20.

(j) *Procurement provisions.* State agencies shall require institutions to adhere to the procurement provisions set forth in §226.22.

(k) *Institution appeal procedures.* Except as provided in §226.8(g), each State agency shall establish an appeal procedure to be followed by an institution requesting a review of a denial of an institution's application for participation, a denial of an application submitted by a sponsoring organization on behalf of a facility, a termination of the participation of an institution or facility, a suspension of an institution's agreement, a denial of an institution's application for start-up or expansion payments, a denial of an advance payment, a denial of all or a part of the claim for reimbursement, (except for late submission under §226.10(e)), a denial by the State agency to forward to FNS an exception request by the institution or sponsoring organization for payment of a late claim or a request for an upward adjustment to a claim, demand for the remittance of an overpayment, and any other action of the State agency affecting the participation of an institution in the Program or the institution's claim for reimbursement. State agencies may use their own State appeal procedures provided the same procedures are applied to all appellants in the State and the procedures meet the following requirements: Appellants are assured of a fair and impartial hearing before an independent official at which they may be represented by legal counsel; decisions are rendered in a timely manner not to exceed 120 days from the date of the receipt of the request for review; appellants are afforded the right to either a review of the record with the right to file written information, or a hearing which they may attend in person; and adequate notice is given of the place, date and procedures of the hearing. The appeal procedures adopted by the State agency shall be made available in writing each year to all institutions at the time of application for participation in the Program and upon request. If the State has not established its own appeal procedures or the procedures do not meet the above listed criteria, the State agency shall observe the following procedures at a minimum:

(1) The institution shall be advised in writing of the grounds on which the State agency based its action. The notice of action, which shall be sent by certified mail, return receipt requested, shall also include a statement indicating that the institution has the right to appeal the action;

- (2) The written request for review shall be filed by the appellant not later than 15 calendar days from the date the appellant received the notice of action, and the State shall acknowledge the receipt of the request for appeal within 10 calendar days;
- (3) The appellant may refute the charges contained in the notice of action in person and by written documentation to the review official. In order to be considered, written documentation must be filed with the review official not later than 30 calendar days after the appellant received the notice of action. The appellant may retain legal counsel, or may be represented by another person. A hearing shall be held by the review official in addition to, or in lieu of, a review of written information submitted by the appellant only if the appellant so specifies in the letter of request for review. Failure of the appellant institution's representative to appear at a scheduled hearing shall constitute the appellant institution's waiver of the right to a personal appearance before the review official, unless the review official agrees to reschedule the hearing. A representative of the State agency shall be allowed to attend the hearing to respond to the appellant's testimony and to answer questions posed by the review official;
- (4) If the appellant has requested a hearing, the appellant and the State agency shall be provided with at least 10 calendar days advance written notice, sent by certified mail, return receipt requested, of the time and place of the hearing;
- (5) Any information on which the State agency's action was based shall be available to the appellant for inspection from the date of receipt of the request for review;
- (6) The review official shall be an independent and impartial official other than, and not accountable to, any person authorized to make decisions that are subject to appeal under the provisions of this section;
- (7) The review official shall make a determination based on information provided by the State agency and the appellant, and on Program regulations;
- (8) Within 60 calendar days of the State agency's receipt of the request for review, the review official shall inform the State agency and the appellant of the determination of the review;
- (9) The State agency's action shall remain in effect during the appeal process. However, participating institutions and facilities may continue to operate under the Program during an appeal of termination, unless the action is based on imminent dangers to the health or welfare of participants. If the institution or facility has been terminated for this reason, the State agency shall so specify in its notice of action. Institutions electing to continue operating while appealing terminations shall not be reimbursed for any meals served during the period of the appeal if the State agency's action is upheld; and
- (10) The determination by the State review official is the final administrative determination to be afforded to the appellant.
- (11) Appeals shall not be allowed on decisions made by FNS on requests for exceptions to the claims submission deadlines stated in §226.10(e) or requests for upward adjustments to claims.
- (12) In cases where an appeal results in the dismissal of a claim against an institution which was asserted by the State agency based upon Federal audit findings, FNS may assert a claim against the State agency in accordance with the procedures outlined in §226.14(c).
- (l) *Program assistance.* Each State agency shall provide technical and supervisory assistance to institutions and facilities to facilitate effective Program operations, monitor progress toward achieving Program goals, and ensure compliance with the Department's nondiscrimination regulations (part 15 of this title) issued under title VI of the Civil Rights Act of 1964. Documentation of supervisory assistance activities, including reviews conducted, corrective actions prescribed, and follow-up efforts, shall be maintained on file by the State agency.

Program reviews shall assess institutional compliance with the provisions of this part and with any applicable instructions of FNS and the Department. Program reviews shall include State agency evaluation of the documentation used by sponsoring organizations to classify their day care homes as tier I day care homes. State agencies shall annually review 33.3 percent of all institutions. State agencies shall also ensure that each institution is reviewed according to the following schedule.

(1) Independent centers, sponsoring organizations of centers, and sponsoring organizations of day care homes with 1 to 200 homes shall be reviewed at least once every four years. Reviews of sponsoring organizations shall include reviews of 15 percent of their child care, adult day care and outside-school-hours care centers and 10 percent of their day care homes.

(2) Sponsoring organizations with more than 200 homes shall be reviewed at least once every two years. Reviews of such sponsoring organizations shall include reviews of 5 percent of the first 1,000 homes and 2.5 percent of all homes in excess of 1,000.

(3) Reviews shall be conducted for newly participating sponsoring organizations with five or more child care facilities or adult day care facilities within the first 90 days of program operations.

(m) *Program irregularities.* Each State agency shall promptly investigate complaints received or irregularities noted in connection with the operation of the Program, and shall take appropriate action to correct any irregularities. State agencies shall maintain on file evidence of such investigations and actions. FNS and OIG may make investigations at the request of the State agency, or whenever FNS or OIG determines that investigations are appropriate.

(n) *Child care standards compliance.* The State agency shall, when conducting administrative reviews of child care centers, outside-school-hours care centers, and day care homes approved by the State agency under paragraph (d)(3) of this section, determine compliance with the child care standards used to establish eligibility, and the institution shall ensure that all violations are corrected and the State shall ensure that the institution has corrected all violations. If violations are not corrected within 60 calendar days of written notification to the institution, the State agency shall terminate the Program participation of the violating institution or facility. However, if the health or safety of the children is imminently threatened, the State agency may immediately terminate participation of the institution or facility. If, during an administrative review of a child care center, outside-school-hours care center, or day care home not approved by the State agency under paragraph (d)(3) of this section, the State agency observes violations of applicable health, safety, or staff-child ratio standards, or attendance in excess of licensed capacity, the State agency shall promptly refer such violations to the appropriate authority. The State agency may deny reimbursement for meals served to attending children in excess of authorized capacity.

(o) *Sponsoring organization agreement.* Each State agency shall develop and provide for the use of a standard form of agreement between each day care home sponsoring organization and all day care homes participating in the Program under such organization. However, the State agency may, at the request of the sponsor, approve an agreement developed by the sponsor. State agencies may develop a similar form for use between sponsoring organizations and other types of facilities.

(p) Following its reviews of institutions and facilities under §§226.6(l) and 226.23(h) conducted prior to July 1, 1988, the State agency shall report data on key elements of program operations on a form designated by FNS. These key elements include but are not limited to the program areas of meal requirements, determination of eligibility for free and reduced price meals, and the

accuracy of reimbursement claims. These forms shall be submitted within 90 days of the completion of the data collection for the institutions except that, if the State has elected to conduct reviews of verification separate from its administrative reviews, the State shall retain data until all key elements have been reviewed and shall report all data for each institution on one form within 90 days of the completion of the data collection for all key elements for that institution. States shall ensure that all key element data for an institution is collected during a 12-month period.

[47 FR 36527, Aug. 20, 1982]

**Editorial Note:** For FEDERAL REGISTER citations affecting §226.6, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

#### **§226.7 State agency responsibilities for financial management.**

(a) This section prescribes standards of financial management systems in administering Program funds by the State agency and institutions.

(b) Each State agency shall maintain an acceptable financial management system, adhere to financial management standards and otherwise carry out financial management policies as delineated in the Uniform Federal Assistance Regulations, at 7 CFR part 3015. State agencies or FNSRO's, where applicable, shall also have a system in place for monitoring and reviewing the institutions' documentation of their nonprofit status to ensure that all Program reimbursement funds are used: (1) Solely for the conduct of the food service operation; or (2) to improve such food service operations, principally for the benefit of the participants.

(c) *Management evaluations and audits.* State agencies shall provide FNS with full opportunity to conduct management evaluations (including visits to institutions and facilities) of all operations of the State agency under the Program and shall provide OIG with full opportunity to conduct audits (including visits to institutions and facilities) of all operations of the State agency under the Program. Within 60 calendar days of receipt of each management evaluation report, the State agency shall submit to FNSRO a written plan for correcting serious deficiencies, including specific timeframes for accomplishing corrective actions and initiating follow-up efforts. If a State agency makes a showing of good cause, however, FNS may allow more than 60 days in which to submit a plan. Each State agency shall make available its records, including records of the receipt and expenditure of funds, upon request by FNS or OIG. OIG shall also have the right to make audits of the records and operation of any institution.

(d) *Reports.* Each State agency shall submit to FNS the final Report of the Child and Adult Care Food Program (FNS 44) for each month which shall be limited to claims submitted in accordance with §226.10(e) and which shall be postmarked and/or submitted no later than 90 days following the last day of the month covered by the report. States shall not receive Program funds for any month for which the final report is not submitted within this time limit unless FNS grants an exception. Upward adjustments to a State agency's report shall not be made after 90 days from the month covered by the report unless authorized by FNS. Downward adjustments shall always be made, without FNS authorization, regardless of when it is determined that such adjustments are necessary. Adjustments shall be reported to FNS in accordance with procedures established by FNS. Each State agency shall also submit to FNS a quarterly Financial Status Report (SF-269) on the use of Program funds. Such reports shall be postmarked and/or submitted no later than 30 days after the end of each fiscal year quarter. Obligations shall be reported only for the fiscal year in which they occur. A final Financial Status Report for each fiscal year shall

be postmarked and/or submitted to FNS within 120 days after the end of the fiscal year. FNS shall not be responsible for reimbursing unpaid Program obligations reported later than 120 days after the close of the fiscal year in which they were incurred.

(e) *Annual plan.* Each State shall submit to the Secretary for approval by August 15 of each year an annual plan for the use of State administrative expense funds, including a staff formula for State personnel.

(f) *Rate assignment.* Each State agency shall require institutions (other than sponsoring organizations for day care homes) to submit, not less frequently than annually, information necessary to assign rates of reimbursement as outlined in §226.9.

(g) *Administrative budget approval.* The State agency shall approve institution administrative budgets, and shall limit allowable administrative costs claimed by each sponsoring organization for day care homes to administrative costs approved in its annual budget. The State agency may establish such administrative costs limits for other institutions. Administrative budget levels may be adjusted to reflect changes in Program activities.

(h) *Start-up and expansion payments.* Each State agency shall establish procedures for evaluating requests for start-up and expansion payments, issuing these payments to eligible sponsoring organizations, and monitoring the use of these payments.

(i) *Advance payments.* Each State agency shall establish procedures for issuing advance payments by the first day of each month and comparing these payments with earned reimbursement on a monthly basis. The State agency shall maintain on file a statement of the State's law and policy governing the use of interest earned on advanced funds by sponsors, institutions, child care facilities and adult day care facilities.

(j) *Recovery of overpayments.* Each State agency shall establish procedures to recover outstanding start-up, expansion and advance payments from institutions which, in the opinion of the State agency, will not be able to earn these payments.

(k) *Claims processing.* Each State agency shall establish procedures for institutions to properly submit claims for reimbursement. All valid claims shall be paid within 45 calendar days of receipt. Within 15 calendar days of receipt of any incomplete or incorrect claim which must be revised for payment, the State agency shall notify the institution as to why and how such claim must be revised. If the State agency disallows partial or full payment for a claim for reimbursement, it shall notify the institution which submitted the claim of its right to appeal under §226.6(k). State agencies may permit disallowances to be appealed separately from claims for reimbursement.

(l) *Participation controls.* The State agency may establish control procedures to ensure that payment is not made for meals served to participants attending in excess of the authorized capacity of each independent center, adult day care facility or child care facility.

(m) *Financial management system.* Each State agency shall establish a financial management system in accordance with the Uniform Federal Assistance Regulations, 7 CFR part 3015, and FNS guidance to identify allowable Program costs and establish standards for institutional recordkeeping and reporting. These standards shall (1) prohibit claiming reimbursement for meals provided by a participant's family, except as authorized by §226.18(e) and (2) allow the cost of meals served to adults who perform necessary food service labor under the Program, except in day care homes. The State agency shall provide guidance on financial management requirements to each institution.

[47 FR 36527, Aug. 20, 1982, as amended at 48 FR 21530, May 13, 1983; Amdt. 5, 49 FR 18988, May 4, 1984; 50 FR 8580, Mar. 4, 1985; 50 FR 26975, July 1, 1985; 53 FR 52589, Dec. 28, 1988; Amdt. 22, 55 FR 1378, Jan. 14,

### **§226.8 Audits.**

(a) Unless otherwise exempt, audits at the State and institution levels shall be conducted in accordance with the Office of Management and Budget's Circulars A-128 and A-110 and the Department's Uniform Federal Assistance Regulations (7 CFR part 3015). Title XIX and title XX proprietary institutions not subject to organization-wide audits shall be audited by the State agency at least once every two years.

(b) The funds provided to the State agency under §226.4(h) may be made available to institutions to fund a portion of organization-wide audits, provided that the organization-wide audit includes tests of the CACFP in accordance with section 10.558 of the Compliance Supplement to OMB Circular A-128. The funds provided to an institution for an organization-wide audit shall not exceed the portion of the audit's cost equal to the CACFP's portion of the total Federal grant.

(c) Funds provided under §226.4(h) may be used by the State agency to conduct program-specific audits of institutions not subject to organization-wide audits, or for which the State agency considers program specific audits to be needed. The State agency may use any funds remaining after all required program-specific audits have been performed to conduct administrative reviews of institutions.

(d) Funds provided under §226.4(h) may only be obligated during the fiscal year for which those funds are allocated. If funds provided under §226.4(h) are not sufficient to meet the requirements of this section, the State agency may then use available State administrative expense funds to conduct audits, provided that the State agency is arranging for the audits and has not passed the responsibility down to the institution.

(e) In conducting management evaluations or audits for any fiscal year, FNS or OIG may disregard any overpayment which does not exceed \$100. In conducting State agency sponsored audits in State administered programs, the State agency may disregard any overpayment which does not exceed the amount established by State law, regulations or procedures as a minimum for which claims will be made for State losses generally. No overpayment shall be disregarded, however, where there are unpaid claims of the same fiscal year from which the overpayment can be deducted, or where there is evidence of violation of criminal law or civil fraud statutes.

(f) While OIG shall rely to the fullest extent feasible upon State sponsored audits, OIG may, whenever it considers necessary:

(1) Make audits on a statewide basis;

(2) Perform on-site test audits;

(3) Review audit reports and related working papers of audits performed by or for State agencies.

(g) State agencies are not required to provide a hearing to an institution for State actions taken on the basis of a Federal audit determination. If a State agency does not provide a hearing in such situations, FNS will provide a hearing, upon request, in accordance with procedures set forth in §226.6(j) of this part.

[47 FR 36527, Aug. 20, 1982, as amended at 50 FR 8580, Mar. 4, 1985; 51 FR 4295, Feb. 4, 1986; 52 FR 5526, Feb. 25, 1987; 53 FR 52590, Dec. 28, 1988; Amdt. 22, 55 FR 1378, Jan. 14, 1990]

## **Subpart D -- Payment Provisions**

### **§226.9 Assignment of rates of reimbursement for centers.**

(a) The State agency shall assign rates of reimbursement, not less frequently than annually, on the basis of family-size and income information reported by each institution. Assigned rates of reimbursement may be changed more frequently than annually if warranted by changes in family-size and income information. Assigned rates of reimbursement shall be adjusted annually to reflect changes in the national average payment rates.

(b) The State agency shall either:

(1) Require that institutions submit each month's figures for meals served daily to participants from families meeting the eligibility standards for free meals, to participants from families meeting the eligibility standards for reduced-price meals, and to participants from families not meeting such guidelines; or

(2) Establish claiming percentages, not less frequently than annually, for each institution on the basis of the number of enrolled participants eligible for free, reduced-price, and paid meals; or

(3) Determine a blended per-meal rate of reimbursement, not less frequently than annually, by adding the products obtained by multiplying the applicable national average payment rate of reimbursement for each category (free, reduced-price, paid) by the claiming percentage for that category.

(c) States have two methods of reimbursing institutions. The method chosen by the State agency must be applied to all institutions participating in the Program in that State. These methods are:

(1) Meals times rates payment, which involves reimbursing an institution for meals served at the assigned rate for each meal. This method entails no comparison to the costs incurred by the institution for the meal service; and,

(2) Meals times rates or actual costs, whichever is the lesser, which involves reimbursing an institution for meals served at the assigned rate for each meal or at the level of the costs actually incurred by the institution for the meal service. This method does entail a comparison of the costs incurred to the meal rates, with the costs being a limiting factor on the level of reimbursement an institution may receive.

(d) In those States where the State agency has chosen the option to implement a meals times rates payment system State-wide, the State agency may elect to pay an institution's final claim for reimbursement for the fiscal year at higher reassigned rates of reimbursement for lunches and suppers; however, the reassigned rates may not exceed the applicable maximum rates of reimbursement established under §210.11(b) of the National School Lunch Program regulations. In those States which use the method of comparing meals times rates or actual costs, whichever is lesser, the total payments made to an institution shall not exceed the total net costs incurred for the fiscal year.

[47 FR 36527, Aug. 20, 1982, as amended at 48 FR 21530, May 13, 1983; 53 FR 52590, Dec. 28, 1988; Amdt. 22, 55 FR 1378, Jan. 14, 1990]

### **§226.10 Program payment procedures.**

(a) By the first day of each month of operation, the State agency shall provide an advance payment to each institution electing to receive such payments, in accordance with §226.6(b)(10).

Advance payments shall equal the full level of claims estimated by the State agency to be submitted in accordance with paragraph (c) of this section, considering prior reimbursement claims and other information such as fluctuations in enrollment. The institution may decline to receive all or any part of the advance.

(b) For each fiscal year, the amount of payment made, including funds advanced to an institution, shall not exceed the amount of valid reimbursement claimed by that institution. To ensure that institutions do not receive excessive advance payments, the State agency shall observe the following procedures:

(1) After three advance payments have been made to an institution, the State agency shall ensure that no subsequent advance is made until the State agency has validated the institution's claim for reimbursement for the third month prior to the month for which the next advance is to be paid.

(2) If the State agency has audit or monitoring evidence of extensive program deficiencies or other reasons to believe that an institution will not be able to submit a valid claim for reimbursement, advance payments shall be withheld until the claim is received or the deficiencies are corrected.

(3) Each month the State agency shall compare incoming claims against advances to ensure that the level of funds authorized under paragraph (a) of this section does not exceed the claims for reimbursement received from the institution. Whenever this process indicates that excessive advances have been authorized, the State agency shall either demand full repayment or adjust subsequent payments, including advances.

(4) If, as a result of year end reconciliation as required by the Department's Uniform Federal Assistance Regulations (7 CFR part 3015), the State agency determines that reimbursement earned by an institution during a fiscal year is less than the amount paid, including funds advanced to that institution, the State agency shall demand repayment of the outstanding balance or adjust subsequent payments.

(c) Claims for Reimbursement shall report information in accordance with the financial management system established by the State agency, and in sufficient detail to justify the reimbursement claimed and to enable the State agency to provide the final Report of the Child and Adult Care Food Program (FNS 44) required under §226.7(d). In submitting a Claim for Reimbursement, each institution shall certify that the claim is correct and that records are available to support that claim. Independent proprietary title XX child care centers shall submit the number and percentage of the enrolled participants, or the licensed capacity receiving title XX benefits for the month claimed for months in which not less than 25 percent of the enrolled children or 25 percent of licensed capacity, whichever is less, were title XX beneficiaries. Sponsoring organizations of such child care centers shall submit the number and percentage of the enrolled children or licensed capacity, whichever is less, receiving title XX benefits for each center for the claim. Sponsoring organizations of such centers shall not submit claims for child care centers in which less than 25 percent of the enrolled children and licensed capacity were title XX beneficiaries for the month claimed. Independent proprietary title XIX or title XX adult day care centers shall submit the percentages of enrolled adult participants receiving title XIX or title XX benefits for the month claimed for months in which not less than 25 percent of enrolled adult participants were title XIX or title XX beneficiaries. Sponsoring organizations of such adult day care centers shall submit the percentage of enrolled adult participants receiving title XIX or title XX benefits for each center for the claim. Sponsoring organizations of such centers shall not submit claims for adult day care centers in which less than 25 percent of enrolled adult participants were title XIX or title XX beneficiaries for the month claimed.

(d) All records to support the claim shall be retained for a period of three years after the date of submission of the final claim for the fiscal year to which they pertain, except that if audit findings have not been resolved, the records shall be retained beyond the end of the three year period as long as may be required for the resolution of the issues raised by the audit. All accounts and records pertaining to the Program shall be made available, upon request, to representatives of the State agency, of the Department, and of the U.S. General Accounting Office for audit or review, at a reasonable time and place.

(e) Unless otherwise approved by FNS, the Claim for Reimbursement for any month shall cover only Program operations for that month except if the first or last month of Program operations in any fiscal year contains 10 operating days or less, such month may be added to the Claim for Reimbursement for the appropriate adjacent month; however, Claims for Reimbursement may not combine operations occurring in two fiscal years. A final Claim for Reimbursement shall be postmarked and/or submitted to the State agency not later than 60 days following the last day of the full month covered by the claim. State agencies may establish shorter deadlines at their discretion. Claims not postmarked and/or submitted within 60 days shall not be paid with Program funds unless FNS determines that an exception should be granted. The State agency shall promptly take corrective action with respect to any Claim for Reimbursement as determined necessary through its claim review process or otherwise. In taking such corrective action, State agencies may make upward adjustments in Program funds claimed on claims filed within the 60 day deadline if such adjustments are completed within 90 days of the last day of the claim month and are reflected in the final Report of the Child and Adult Care Food Programs (FNS-44) for the claim month which is required under 226.7(d). Upward adjustments in Program funds claimed which are not reflected in the final FNS-44 for the claim month shall not be made unless authorized by FNS. Downward adjustments in Program funds claimed shall always be made without FNS authorization regardless of when it is determined that such adjustments are necessary.

(f) If a State agency has reason to believe that an institution or food service management company has engaged in unlawful acts with respect to Program Operations, evidence found in audits, investigations or other reviews shall be a basis for non-payment of claims for reimbursement.

[47 FR 36527, Aug. 20, 1982, as amended by Amdt. 5, 49 FR 18988, May 4, 1984; 50 FR 26975, July 1, 1985; 53 FR 52590, Dec. 28, 1988; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 62 FR 23618, May 1, 1997]

#### **§226.11 Program payments for child care centers, adult day care centers and outside-school-hours care centers.**

(a) Payments shall be made only to institutions operating under an agreement with the State agency for the meal types specified in the agreement served at approved child care centers, adult day care centers and outside-school-hours care centers. A State agency may make payment for meals served in accordance with provisions of the Program in the calendar month preceding the calendar month in which the agreement is executed.

(b) Each child care institution shall report each month to the State agency the total number of meals, by type (breakfasts, lunches, suppers, and supplements), served to children, except that such reports shall be made for a proprietary title XX center only for calendar months during which not less than 25 percent of enrolled children, or 25 percent of licensed capacity, whichever is less, were title XX beneficiaries. Each adult day care institution shall report each month to the

State agency the total number of meals, by type (breakfasts, lunches, suppers, and supplements), served to adult participants, except that such reports shall be made for a proprietary title XIX or title XX center only for calendar months during which no less than 25 percent of enrolled adult participants were title XIX or title XX beneficiaries.

(c) Each State agency shall base reimbursement to each child care institution on the number of meals, by type, served to children multiplied by the assigned rates of reimbursement, except that reimbursement shall be payable to proprietary title XX child care centers only for calendar months during which not less than 25 percent of enrolled children, or 25 percent of licensed capacity, whichever is less, were title XX beneficiaries. Each State agency shall base reimbursement to each adult day care institution on the number of meals, by type, served to adult participants multiplied by the assigned rates of reimbursement, except that reimbursement shall be payable to proprietary title XIX and title XX adult day care centers only for calendar months during which not less than 25 percent of enrolled adult participants were title XIX or Title XX beneficiaries. In computing reimbursement, the State agency shall either:

(1) Base reimbursement to institutions on actual daily counts of meals served, and multiply the number of meals, by type, served to participants eligible to receive free meals, served to participants eligible to receive reduced-price meals, and served to participants from families not meeting such standards by the applicable national average payment rate; or

(2) Apply the applicable claiming percentage or percentages to the total number of meals, by type, served to participants and multiply the product or products by the assigned rate of reimbursement for each meal type; or

(3) Multiply the assigned blended per meal rate of reimbursement by the total number of meals, by type, served to participants.

(d) If the State agency elects to reimburse its institutions according to the lesser of rates or actual costs, total Program payments to an institution during any fiscal year, including any cash payments in lieu of commodities, shall not exceed allowable Program operating and administrative costs, less income to the Program. The State agency may limit payments for administrative costs to the amount approved in the annual administrative budget of the institution. The State agency may prohibit an institution from using payments for operating costs to pay for administrative expenses.

(e) Each institution shall maintain records as prescribed by the State agency's financial management system.

[47 FR 36527, Aug. 20, 1982, as amended at 48 FR 21530, May 13, 1983; 52 FR 36907, Oct. 2, 1987; 53 FR 52590, Dec. 28, 1988; 62 FR 23618, May 1, 1997]

## **§226.12 Administrative payments to sponsoring organizations for day care homes.**

(a) *General.* Sponsoring organizations for day care homes shall receive payments for administrative costs. During any fiscal year, administrative costs payments to a sponsoring organization may not exceed the lesser of (1) actual expenditures for the costs of administering the Program less income to the Program, or (2) the amount of administrative costs approved by the State agency in the sponsoring organization's budget, or (3) the sum of the products obtained by multiplying each month the sponsoring organization's:

(i) Initial 50 day care homes by 42 dollars;

(ii) Next 150 day care homes by 32 dollars;

(iii) Next 800 day care homes by 25 dollars; and

(iv) Additional day care homes by 22 dollars.

During any fiscal year, administrative payments to a sponsoring organization may not exceed 30 percent of the total amount of administrative payments and food service payments for day care home operations.

(b) *Start-up and expansion payments.* (1) Prospective sponsoring organizations of day care homes, participating sponsoring organizations of child care centers or outside-school-hours care centers, independent centers, and participating sponsoring organizations of less than 50 homes which meet the criteria in paragraph (b)(2) of this section shall be entitled to receive start-up payments to develop or expand successful Program operations in day care homes. Participating sponsoring organizations of day care homes which meet the criteria in paragraph (b)(2) of this section shall be entitled to receive expansion payments to initiate or expand Program operations in day care homes in low-income or rural areas. The State agency shall approve start-up payments only once for any eligible sponsoring organization, but may approve expansion payments for any eligible sponsoring organization more than once, provided that: the request must be for expansion into an area(s) other than that specified in their initial or prior request; and 12 months has elapsed since the sponsoring organization has satisfied all obligations under its initial or prior expansion agreement. Eligible sponsoring organizations which have received start-up payments shall be eligible to apply for expansion payments at a date no earlier than 12 months after it has satisfied all its obligations under its start-up agreement with the State agency.

(2) Sponsoring organizations which apply for start-up or expansion payments shall evidence:

- (i) Public or tax-exempt status, or moving toward compliance with the requirements for IRS tax-exempt status, in accordance with §226.15(a);
- (ii) An organizational history of managing funds and ongoing activities (i.e., administering public or private programs);
- (iii) An acceptable and realistic plan for recruiting day care homes to participate in the Program (such as the method of contacting providers), which may be based on estimates of the number of day care homes to be recruited and information supporting their existence, and in the case of sponsoring organizations applying for expansion payments, documentation that the day care homes to be recruited are located in low-income or rural areas; and
- (iv) An acceptable preliminary sponsoring organization management plan including, but not limited to, plans for preoperational visits and training.

(3) The State agency shall deny start-up and expansion payments to applicant sponsoring organizations which fail to meet the criteria of paragraph (b)(2) of this section or which have not been financially responsible in the operation of other programs funded by Federal, State, or local governments. The State agency shall notify the sponsoring organization of the reasons for denial and allow the sponsoring organization full opportunity to submit evidence on appeal as provided for in §226.6(k). Any sponsoring organization applying for start-up or expansion funds shall be notified of approval or disapproval by the State agency in writing within 30 calendar days of filing a complete and correct application. If a sponsoring organization submits an incomplete application, the State agency shall notify the sponsoring organization within 15 calendar days of receipt of the application and shall provide technical assistance, if necessary, to the sponsoring organization for the purpose of completing its application.

(4) Sponsoring organizations which apply for and meet the criteria for start-up or expansion payments shall enter into an agreement with the State agency. The agreement shall specify:

- (i) Activities which the sponsoring organization will undertake to initiate or expand Program operations in day care homes;

- (ii) The amount of start-up or expansion payments to be issued to the sponsoring organization, together with an administrative budget detailing the costs which the sponsoring organization shall incur, document, and claim;
  - (iii) The time allotted to the sponsoring organization for the initiation or expansion of Program operations in family day care homes;
  - (iv) The responsibility of the applicant sponsoring organization to repay, upon demand by the State agency, start-up or expansion payments not expended in accordance with the agreement.
- (5) Upon execution of the agreement, the State agency shall issue a start-up or expansion payment to the sponsoring organization in an amount equal to not less than one, but not more than two month's anticipated administrative reimbursement to the sponsoring organization as determined by the State agency. However, no sponsoring organization may receive start-up or expansion payments for more than 50 day care homes. Eligible sponsoring organizations with fewer than 50 homes under their jurisdiction at the time of application for start-up payments may receive such payments for up to 50 homes, less the number of homes under their jurisdiction. Eligible sponsoring organizations applying for expansion funds may receive at a maximum such payments for up to 50 homes at the currently assigned administrative payment for the first 50 homes. In determining the amount of start-up or expansion payments to be made to a sponsoring organization, the State agency shall consider the anticipated level of start-up or expansion costs to be incurred by the sponsoring organization and alternate sources of funds available to the sponsoring organization.
- (6) Upon expiration of the time allotted to the sponsoring organization for initiating or expanding Program operations in day care homes, the State agency shall obtain and review documentation of activities performed and costs incurred by the sponsoring organization under the terms of the start-up or expansion agreement. If the sponsoring organization has not made every reasonable effort to carry out the activities specified in the agreement, the State agency shall demand repayment of all or part of the payment. The sponsoring organization may retain start-up or expansion payments for all day care homes which initiate Program operations. However, no sponsoring organization may retain any start-up or expansion payments in excess of its actual costs for the expenditures specified in the agreement.

[47 FR 36527, Aug. 20, 1982; 47 FR 46072, Oct. 15, 1982, as amended at 53 FR 52590, Dec. 28, 1988; 63 FR 9728, Feb. 26, 1998]

### **§226.13 Food service payments to sponsoring organizations for day care homes.**

- (a) Payments shall be made only to sponsoring organizations operating under an agreement with the State agency for the meal types specified in the agreement served to enrolled nonresident children and eligible enrolled children of day care home providers, at approved day care homes.
- (b) Each sponsoring organization shall report each month to the State agency the total number of meals, by type (breakfasts, lunches, suppers, and supplements) and by category (tier I and tier II), served to children enrolled in approved day care homes.
- (c) Each sponsoring organization shall receive payment for meals served to children enrolled in approved day care homes at the tier I and tier II reimbursement rates, as applicable, and as established by law and adjusted in accordance with §226.4. However, the rates for lunches and suppers shall be reduced by the value of commodities established under §226.5(b) for all sponsoring organizations for day care homes which have elected to receive commodities. For tier I day care homes, the full amount of food service payments shall be disbursed to each day care

home on the basis of the number of meals served, by type, to enrolled children. For tier II day care homes, the full amount of food service payments shall be disbursed to each day care home on the basis of the number of meals served to enrolled children by type, and by category (tier I and tier II) as determined in accordance with paragraphs (d)(2) and (d)(3) of this section.

However, the sponsoring organization may withhold from Program payments to each home an amount equal to costs incurred for the provision of Program foodstuffs or meals by the sponsoring organization on behalf of the home and with the home provider's written consent.

(d) As applicable, each sponsoring organization for day care homes shall:

(1) Require that tier I day care homes submit the number of meals served, by type, to enrolled children.

(2) Require that tier II day care homes in which the provider elects not to have the sponsoring organization identify enrolled children who are eligible for free or reduced price meals submit the number of meals served, by type, to enrolled children.

(3) Not more frequently than annually, select one of the methods described in paragraphs (d)(3)(i)-(iii) of this section for all tier II day care homes in which the provider elects to have the sponsoring organization identify enrolled children who are eligible for free or reduced price meals. In such homes, the sponsoring organization shall either:

(i) Require that such day care homes submit the number and types of meals served each day to each enrolled child by name. The sponsoring organization shall use the information submitted by the homes to produce an actual count, by type and by category (tier I and tier II), of meals served in the homes; or

(ii) Establish claiming percentages, not less frequently than semiannually, for each such day care home on the basis of one month's data concerning the number of enrolled children determined eligible for free or reduced-price meals. Sponsoring organizations shall obtain one month's data by collecting either enrollment lists (which show the name of each enrolled child in the day care home), or attendance lists (which show, by days or meals, the rate of participation of each enrolled child in the day care home). The State agency may require a sponsoring organization to recalculate the claiming percentage for any of its day care homes before the required semiannual calculation if the State agency has reason to believe that a home's percentage of income-eligible children has changed significantly or was incorrectly established in the previous calculation.

Under this system, day care homes shall be required to submit the number of meals served, by type, to enrolled children; or

(iii) Determine a blended per-meal rate of reimbursement, not less frequently than semiannually, for each such day care home by adding the products obtained by multiplying the applicable rates of reimbursement for each category (tier I and tier II) by the claiming percentage for that category, as established in accordance with paragraph (d)(3)(ii) of this section. The State agency may require a sponsoring organization to recalculate the blended rate for any of its day care homes before the required semiannual calculation if the State agency has reason to believe that a home's percentage of income-eligible children has changed significantly or was incorrectly established in the previous calculation. Under this system, day care homes shall be required to submit the number of meals served, by type, to enrolled children.

[47 FR 36527, Aug. 20, 1982, as amended at 62 FR 903, Jan. 7, 1997; 62 FR 5519, Feb. 6, 1997; 63 FR 9105, Feb. 24, 1998]

## **§226.14 Claims against institutions.**

(a) State agencies shall disallow any portion of a claim for reimbursement and recover any payment to an institution not properly payable under this part. State agencies may consider claims for reimbursement not properly payable if an institution does not comply with the recordkeeping requirements contained in this part. In addition, except with approval from the appropriate FNSRO, State agencies shall consider claims for reimbursement not payable when an institution fails to comply with the recordkeeping requirements that pertain to records directly supporting claims for reimbursement. Records that directly support claims for reimbursement include, but are not limited to, daily meal counts, menu records, and enrollment and attendance records, as required by §226.15(e). State agencies shall assert overclaims against any sponsoring organization of day care homes which misclassifies a day care home as a tier I day care home unless the misclassification is determined to be inadvertent under guidance issued by FNS. However, the State agency shall notify the institution of the reasons for any disallowance or demand for repayment, and allow the institution full opportunity to submit evidence on appeal as provided for in §226.6(k). Minimum State agency collection procedures for unearned payments shall include:

(1) Written demand to the institution for the return of improper payments; (2) if, after 30 calendar days, the institution fails to remit full payment or agree to a satisfactory repayment schedule, a second written demand for the return of improper payments sent by certified mail return receipt requested; and (3) if, after 60 calendar days, the institution fails to remit full payment or agree to a satisfactory repayment schedule, the State agency shall refer the claim against the institution to appropriate State or Federal authorities for pursuit of legal remedies.

(b) In the event that the State agency finds that an institution which prepares its own meals is failing to meet the meal requirements of §226.20, the State agency need not disallow payment or collect an overpayment arising out of such failure if the institution takes such other action as, in the opinion of the State agency, will have a corrective effect. However, the State agency shall not disregard any overpayments or waive collection action arising from the findings of Federal audits.

(c) If FNS does not concur with the State agency's action in paying an institution or in failing to collect an overpayment, FNS shall notify the State agency of its intention to assert a claim against the State agency. In all such cases, the State agency shall have full opportunity to submit evidence concerning the action taken. The State agency shall be liable to FNS for failure to collect an overpayment, unless FNS determines that the State agency has conformed with this part in issuing the payment and has exerted reasonable efforts to recover the improper payment.

[47 FR 36527, Aug. 20, 1982; 47 FR 46072, Oct. 15, 1982, as amended at 50 FR 8580, Mar. 4, 1985; 53 FR 52590, Dec. 28, 1988; 62 FR 903, Jan. 7, 1997; 64 FR 72260, Dec. 27, 1999]

## **Subpart E -- Operational Provisions**

### **§226.15 Institution provisions.**

(a) *Tax-exempt status.* Except for proprietary title XIX and title XX centers, and sponsoring organizations of such centers, institutions shall be public, or have tax-exempt status under the Internal Revenue Code of 1986, or be moving toward compliance with the requirements for tax-

exempt status, or be currently operating another Federal program requiring nonprofit status. An institution which has applied to IRS for tax-exempt status may participate in the program while its application is pending review by IRS. It shall, however, be the responsibility of the institution to document that it has complied with all requirements of IRS and has provided all information requested. If IRS denies the application for tax-exempt status, the institution shall immediately notify the State agency of such denial. The State agency shall then terminate the participation of the institution. If IRS certification of tax-exempt status has not been received within 12 months of filing the application with IRS, and IRS indicates that the institution has failed to provide all required information, the State agency shall terminate the participation of the institution until such time as IRS tax-exempt status is obtained.

(b) *Applications.* Each institution shall submit to the State agency all information required for its approval. As a minimum, such information shall include:

(1) Except for proprietary title XIX and title XX centers and sponsoring organizations or proprietary title XIX and title XX centers, evidence of nonprofit status, in accordance with §226.15(a).

(2) An application for participation, or application renewal materials, accompanied by all necessary supporting documentation;

(3) An administrative budget;

(4) If an independent child care center or independent outside-school-hours care center, documentation that it meets the licensing/approval requirements of §226.6(d)(1); or, if an independent adult day care center, the licensing/approval requirements of §226.19a(b)(3).

(5) A nondiscrimination and free and reduced-price policy statement, and information regarding a public release, in accordance with §226.23; and

(6) For each proprietary title XX child care center, documentation that it provides nonresidential day care services for which it receives compensation under title XX of the Social Security Act, and certification that not less than 25 percent of the enrolled children, or 25 percent of the licensed capacity, whichever is less, during the most recent calendar month were title XX beneficiaries. For each proprietary title XIX or title XX adult day care center, documentation that it provides nonresidential day care services for which it receives compensation under title XIX or title XX of the Social Security Act, and certification that not less than 25 percent of the adult participants enrolled during the most recent calendar month were title XIX or title XX beneficiaries. Sponsoring organizations shall provide documentation and certification for each proprietary title XIX or title XX center under its jurisdiction.

(c) *Responsibility.* Each institution shall accept final administrative and financial responsibility for Program operations. No institution may contract out for management of the Program.

(d) *Staffing.* Each institution shall provide adequate supervisory and operational personnel for management and monitoring of the Program.

(e) *Recordkeeping.* Each institution shall establish procedures to collect and maintain all program records required under this part, as well as any records required by the State agency. Failure to maintain such records shall be grounds for the denial of reimbursement for meals served during the period covered by the records in question and for the denial of reimbursement for costs associated with such records. At a minimum, the following records shall be collected and maintained:

(1) Copies of all applications and supporting documents submitted to the State agency;

- (2) Documentation of the enrollment of each participant at child care centers, adult day care centers and outside-school-hours care centers including information used to determine eligibility for free or reduced price meals in accordance with §226.23(e)(1).
  - (3) Documentation of: The enrollment of each child at day care homes; information used to determine the eligibility of enrolled providers' children for free or reduced price meals; information used to classify day care homes as tier I day care homes, including official source documentation obtained from school officials when the classification is based on elementary school data; and information used to determine the eligibility of enrolled children in tier II day care homes that have been identified as eligible for free or reduced price meals in accordance with §226.23(e)(1).
  - (4) Daily records indicating the number of participants in attendance and the number of meals, by type (breakfast, lunch, supper, and supplements), served to participants.
  - (5) For child care centers and outside-school-hours care centers claiming reimbursement for two meals and two supplements or three meals and one supplement per child per day, either:
    - (i) Documentation of total time-in-attendance for each child at the center for each day for which the fourth meal service was claimed, including a time-in/time-out form which records time-in-attendance for each child at the center; or, at the discretion of the State agency,
    - (ii) Documentation which demonstrates that at least eight hours elapse between the end of the first meal service and the beginning of the fourth meal service on any day in which reimbursement is claimed for a fourth meal; service.
  - (6) Except at day care homes, daily records indicating the number of meals, by type, served to adults performing labor necessary to the food service;
  - (7) Copies of invoices, receipts, or other records required by the State agency financial management instruction to document:
    - (i) Administrative costs claimed by the institution;
    - (ii) Operating costs claimed by the institution except sponsoring organizations of day care homes; and
    - (iii) Income to the Program.
  - (8) Copies of all claims for reimbursement submitted to the State agency;
  - (9) Receipts for all Program payments received from the State agency;
  - (10) If applicable, information concerning the dates and amounts of disbursement to each child care facility or adult day care facility under its auspices;
  - (11) Copies of menus, and any other food service records required by the State agency;
  - (12) If applicable, information concerning the location and dates of each child care or adult day care facility review, any problems noted, and the corrective action prescribed and effected;
  - (13) Information on training session date(s) and location(s), as well as topics presented and names of participants; and
  - (14) Documentation of nonprofit food service to ensure that all Program reimbursement funds are used: (i) Solely for the conduct of the food service operation; or (ii) to improve such food service operations, principally for the benefit of the enrolled participants.
- (f) *Day care home classifications.* Each sponsoring organization of day care homes shall determine which of the day care homes under its sponsorship are eligible as tier I day care homes. A sponsoring organization may use current school or census data provided by the State agency or free and reduced price applications collected from day care home providers in making a determination for each day care home. When using elementary school or census data for making tier I day care home determinations, a sponsoring organization shall first consult school

data, except in cases in which busing or other bases of attendance, such as magnet or charter schools, result in school data not being representative of an attendance area's household income levels. In these cases, census data should generally be consulted instead of school data. A sponsoring organization may also use census data if, after reasonable efforts are made, as defined by the State agency, the sponsoring organization is unable to obtain local elementary school attendance area information. A sponsoring organization may also consult census data after having consulted school data which fails to support a tier I day care home determination for rural areas with geographically large elementary school attendance areas, for other areas in which an elementary school's free and reduced price enrollment is above 40 percent, or in other cases with State agency approval. However, if a sponsoring organization believes that a segment of an otherwise eligible elementary school attendance area is above the criteria for free or reduced price meals, then the sponsoring organization shall consult census data to determine whether the homes in that area qualify as tier I day care homes based on census data. If census data does not support a tier I classification, then the sponsoring organization shall reclassify homes in segments of such areas as tier II day care homes unless the individual providers can document tier I eligibility on the basis of their household income. When making tier I day care home determinations based on school data, a sponsoring organization shall use attendance area information that it has obtained, or verified with appropriate school officials to be current, within the last school year. Determinations of a day care home's eligibility as a tier I day care home shall be valid for one year if based on a provider's household income, three years if based on school data, or until more current data are available if based on census data. However, a sponsoring organization, State agency, or FNS may change the determination if information becomes available indicating that a home is no longer in a qualified area. The State agency shall not routinely require annual redeterminations of the tiering status of tier I day care homes based on updated elementary school data.

(g) *Claims submission.* Each institution shall submit claims for reimbursement to the State agency in accordance with §226.10.

(h) *Program agreement.* Each institution shall enter into a Program agreement with the State agency in accordance with §226.6(f)(1).

(i) *Commodities.* Each institution receiving commodities shall ensure proper commodity utilization.

(j) *Special Milk Program.* No institution may participate in both the Child and Adult Care Food Program and the Special Milk Program at the same time.

(k) *Elderly feeding programs.* Institutions which are school food authorities (as defined in part 210 of this chapter) may use facilities, equipment and personnel supported by funds provided under this part to support a nonprofit nutrition program for the elderly, including a program funded under the Older Americans Act of 1965 (42 U.S.C. 3001 *et seq.*).

[47 FR 36527, Aug. 20, 1982, as amended at 48 FR 21530, May 13, 1983; 50 FR 8580, Mar. 4, 1985; 52 FR 15298, Apr. 28, 1987; 52 FR 36907, Oct. 2, 1987; 53 FR 52590, Dec. 28, 1988; 54 FR 26724, June 26, 1989; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 56 FR 58174, Nov. 16, 1991; 61 FR 25554, May 22, 1996; 62 FR 903, Jan. 7, 1997; 62 FR 23619, May 1, 1997; 63 FR 9105, Feb. 24, 1998; 64 FR 72260, Dec. 27, 1999]

## **§226.16 Sponsoring organization provisions.**

(a) Each sponsoring organization shall comply with all provisions of §226.15.

(b) Each sponsoring organization shall submit to the State agency all information required for its approval and the approval of all child care and adult day care facilities under its jurisdiction, including:

(1) A sponsoring organization management plan, in accordance with §226.6(f)(2);

(2) An application for participation, or renewal materials, for each child care and adult day care facility accompanied by all necessary supporting documentation; and

(3) Timely information concerning the eligibility status of child care and adult day care facilities (such as licensing/approval actions).

(c) Each sponsoring organization shall accept final administrative and financial responsibility for food service operations in all child care and adult day care facilities under its jurisdiction.

(d) Each sponsoring organization shall provide adequate supervisory and operational personnel for the effective management and monitoring of the program at all child care and adult day care facilities under its jurisdiction. At a minimum, such Program assistance shall include:

(1) Pre-approval visits to each child care and adult day care facility for which application is made to discuss Program benefits and verify that the proposed food service does not exceed the capability of the child care facility;

(2) Staff training for all child care and adult day care facilities in Program duties and responsibilities prior to beginning Program operations;

(3) Additional training sessions, to be provided not less frequently than annually; and

(4) Reviews of food service operations to assess compliance with meal pattern, recordkeeping, and other Program requirements. Such reviews shall be made not less frequently than:

(i) Three times each year at each child care center and adult day care center, provided at least one review is made during each child care or adult day care center's first six weeks of Program operations and not more than six months elapse between reviews;

(ii) Three times each year at each day care home, provided at least one review is made during each day care home's first four weeks of Program operations and not more than six months elapse between reviews. However, based on case-by-case findings by the State agency that improved efficiency and more effective management will result and subject to FNSRO approval, State agencies may allow some or all of their sponsors to conduct reviews an average of three times each year per day care home, provided that each day care home is reviewed at least twice each year, at least one review is made during each day care home's first four weeks of Program operations, and no more than six months elapse between reviews; and

(iii) Six times each year for each outside-school-hours care center, provided at least one review is made during each outside-school-hours care center's first four weeks of Program operations and not more than three months elapse between reviews.

(e) Each sponsoring organization shall comply with the recordkeeping requirements established in §§226.10(d) and 226.15(e) and any recordkeeping requirements established by the State agency in order to justify the administrative payments made in accordance with §226.12(a).

Failure to maintain such records shall be grounds for the denial of reimbursement.

(f) The State agency may require a sponsoring organization to enter into separate agreements for the administration of separate types of facilities (child care centers, day care homes, adult day care centers, and outside-school-hours care centers).

(g) Each sponsoring organization electing to receive advance payments of program funds for day care homes shall disburse the full amount of such payments within five working days of receipt from the State agency. If the sponsor requests the full operating advance to which it is entitled, the advances to day care homes shall be the full amount which the sponsor expects the home to

earn based on the number of meals projected to be served to enrolled children during the period covered by the advance multiplied by the applicable payment rate as specified in §226.13(c). If a sponsor elects to receive only a part of the operating advance to which it is entitled, or if the full operating advance is insufficient to provide a full advance to each home, the advance shall be disbursed to its homes in a manner and an amount the sponsor deems appropriate. Each sponsor shall disburse any reimbursement payments for food service due to each day care home within five working days of receipt from the State agency. Such payment shall be based on the number of meals served to enrolled children at each day care home, less any payments advanced to such home. However, the sponsoring organization may withhold from Program payments to each home an amount equal to food service operating costs incurred by the sponsoring organization in behalf of the home and with the home provider's written consent. If payments from the State agency are not sufficient to provide all day care homes under the sponsoring organization's jurisdiction with advance payments and reimbursement payments, available monies shall be used to provide all due reimbursement payments before advances are disbursed.

(h) Sponsoring organizations shall make payments of program funds to child care centers, adult day care centers or outside-school-hours care centers within five working days of receipt from the State agency, on the basis of the management plan approved by the State agency, and may not exceed the Program costs documented at each facility during any fiscal year; except in those States where the State agency has chosen the option to implement a meals times rates payment system. In those States which implement this optional method of reimbursement, such disbursements may not exceed the rates times the number of meals documented at each facility during any fiscal year.

(i) Disbursements of advance payments may be withheld from child and adult day care facilities which fail to submit reports required by §226.15(e).

(j) A for-profit organization shall be eligible to serve as a sponsoring organization for proprietary title XIX or title XX centers which have the same legal identity as the organization, but shall not be eligible to sponsor proprietary title XIX or title XX centers which are legally distinct from the organization, day care homes, or public or private nonprofit centers.

(k) Before sponsoring organizations expend administrative funds to assist family day care homes in becoming licensed, they shall obtain the following information from each such home: a completed free and reduced price application which documents that the provider meets the Program's income standards; evidence of its application for licensing and official documentation of the defects that are impeding its licensing approval; and a completed CACFP application.

These funding requests are limited to \$300 per home and are only available to each home once.

[47 FR 36527, Aug. 20, 1982; 47 FR 46072, Oct. 15, 1982, as amended at 48 FR 21530, May 13, 1983; 50 FR 8580, Mar. 4, 1985; 50 FR 26975, July 1, 1985; 53 FR 52591, Dec. 28, 1988; 63 FR 9729, Feb. 26, 1998; 64 FR 72260, Dec. 27, 1999]

#### **§226.17 Child care center provisions.**

(a) Child care centers may participate in the Program either as independent centers or under the auspices of a sponsoring organization; provided, however, that public and private nonprofit centers shall not be eligible to participate in the Program under the auspices of a for-profit sponsoring organization. Child care centers participating as independent centers shall comply with the provisions of §226.15.

(b) All child care centers, independent or sponsored, shall meet the following requirements

(1) Child care centers shall have Federal, State, or local licensing or approval to provide day care services to children. Child care centers which are complying with applicable procedures to renew licensing or approval may participate in the Program during the renewal process, unless the State agency has information which indicates that renewal will be denied. If licensing or approval is not available, a center may participate if:

(i) It receives title XX funds for child care; or

(ii) It demonstrates compliance with the CACFP child care standards or any applicable State or local child care standards to the State agency.

(2) Except for proprietary title XX centers, child care centers shall be public, or have tax exempt status under the Internal Revenue Code of 1986, or be moving toward compliance with the requirements for tax-exempt status, or be currently operating another Federal program requiring nonprofit status. A child care center which has applied to the Internal Revenue Service (IRS) for tax-exempt status may participate in the Program while its application is pending review by IRS. If IRS denies the application for tax-exempt status, the child care center shall immediately notify the State agency of such denial and the State agency shall terminate the participation of the child care center. If IRS certification of nonprofit status has not been received within 12 months of filing the application with IRS, and IRS indicates that the child care center has failed to provide all required information, the State agency shall terminate the participation of the child care center until such time as IRS tax-exempt status is obtained.

(3) Each child care center participating in the Program shall serve one or more of the following meal types: (i) Breakfast, (ii) lunch, (iii) supper, and (iv) supplemental food. Reimbursement shall not be claimed for more than two meals and one supplement provided daily to each child, except that reimbursement may be claimed for two meals and two supplements or three meals and one supplement served to a child for each day in which that child is maintained in care for eight or more hours.

(4) Each child care center participating in the Program shall claim only the meal types specified in its approved application in accordance with the meal pattern requirements specified in §226.20. Reimbursement may not be claimed for meals served to children who are not enrolled, or for meals served to children at any one time in excess of the child care center's authorized capacity, or for any meal served at a proprietary title XX center during a calendar month when less than 25 percent of enrolled children or 25 percent of licensed capacity, whichever is less, were title XX beneficiaries. Menus and any other nutritional records required by the State agency shall be maintained to document compliance with such requirements.

(5) A child care center with pre-school children may also be approved to serve a breakfast, supplement, and supper to school-age children enrolled in an outside-school-hours care program meeting the criteria of §226.19(b) which is distinct from its day care program for preschool-age children. The State agency may authorize the service of lunch to such enrolled children who attend a school which does not offer a lunch program provided the limit of not more than two meals and one supplement per child per day is not exceeded. If the majority of children served by the center are participating in an outside-school-hours care program, the center shall comply with reporting requirements of §226.19 and, if it is a facility, shall be monitored by the sponsoring organization at the frequency specified in §226.16(d)(4)(iii).

(6) A child care center may utilize existing school food service facilities or obtain meals from a school food service facility, and the pertinent requirements of this part shall be embodied in a written agreement between the child care center and school. The center shall maintain responsibility for all Program requirements set forth in this part.

(7) Child care centers shall collect and maintain documentation of the enrollment of each child, including information used to determine eligibility for free and reduced price meals in accordance with §226.23(e)(1). In addition, Head Start participants need only have a Head Start statement of income eligibility, or a statement of Head Start enrollment from an authorized Head Start representative, to be eligible for free meal benefits under the CACFP.

(8) Each child care center shall maintain daily records of the number of meals by type (breakfast, lunch, supper, and supplements) served to enrolled children, and to adults performing labor necessary to the food service.

(c) Each child care center shall comply with the recordkeeping requirements established in §226.10(d), in paragraph (b) of this section and, if applicable, in §226.15(e). Failure to maintain such records shall be grounds for the denial of reimbursement.

[47 FR 36527, Aug. 20, 1982, as amended at 52 FR 36907, Oct. 2, 1987; 53 FR 52591, Dec. 28, 1988; 54 FR 26724, June 26, 1989; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 61 FR 25554, May 22, 1996; 62 FR 23619, May 1, 1997; 63 FR 9729, Feb. 26, 1998; 64 FR 72261, Dec. 27, 1999]

#### **§226.18 Day care home provisions.**

(a) Day care homes shall have current Federal, State or local licensing or approval to provide day care services to children. Day care homes which cannot obtain their license because they lack the funding to comply with licensing standards may request a total limit per home of \$300 in administrative funds from a sponsoring organization to assist them in obtaining their license. Day care homes that, at the option of their sponsoring organization, receive administrative funds for licensing-related expenses must complete documentation requested by their sponsor as described in §226.16(k) prior to receiving any funds. Day care homes which are complying with applicable procedures to renew licensing or approval may participate in the Program during the renewal process, unless the State agency has information which indicates that renewal will be denied. If licensing or approval is not available, a day care home may participate in the Program if:

(1) It receives title XX funds for providing child care; or

(2) It demonstrates compliance with CACFP child care standards or applicable State or local child care standards to the State agency.

(b) Day care homes participating in the program shall operate under the auspices of a public or private nonprofit sponsoring organization. Sponsoring organizations shall enter into a written agreement with each sponsored day care home which specifies the rights and responsibilities of both parties. This agreement shall be developed by the State agency, unless the State agency elects, at the request of the sponsor, to approve an agreement developed by the sponsor. At a minimum, the agreement shall embody:

(1) The right of the sponsoring organization, the State agency, and the Department to visit the day care home and review its meal service and records during its hours of child care operations;

(2) The responsibility of the sponsoring organization to train the day care home's staff in program requirements;

(3) The responsibility of the day care home to prepare and serve meals which meet the meal patterns specified in §226.20;

(4) The responsibility of the day care home to maintain records of menus, and of the number of meals, by type, served to enrolled children;

- (5) The responsibility of the day care home to promptly inform the sponsoring organization about any change in the number of children enrolled for care or in its licensing or approval status;
  - (6) The meal types approved for reimbursement to the day care home by the State agency;
  - (7) The right of the day care home to receive in a timely manner the full food service rate for each meal served to enrolled children for which the sponsoring organization has received payment from the State agency. However, if, with the home provider's consent, the sponsoring organization will incur costs for the provision of program foodstuffs or meals in behalf of the home, and subtract such costs from Program payments to the home, the particulars of this arrangement shall be specified in the agreement;
  - (8) The right of the sponsoring organization or the day care home to terminate the agreement for cause or, subject to stipulations by the State agency, convenience; and
  - (9) A prohibition of any sponsoring organization fee to the day care home for its Program administrative services.
  - (10) If the State agency has approved a time limit for submission of meal records by day care homes, that time limit shall be stated in the agreement.
  - (11) The responsibility of the sponsoring organization to inform tier II day care homes of all of their options for receiving reimbursement for meals served to enrolled children. These options include: electing to have the sponsoring organization attempt to identify all income-eligible children enrolled in the day care home, through collection of free and reduced price applications and/or possession by the sponsoring organization or day care home of other proof of a child or household's participation in a categorically eligible program, and receiving tier I rates of reimbursement for the meals served to identified income-eligible children; electing to have the sponsoring organization identify only those children for whom the sponsoring organization or day care home possess documentation of the child or household's participation in a categorically eligible program, under the expanded categorical eligibility provision contained in §226.23(e)(1), and receiving tier I rates of reimbursement for the meals served to these children; or receiving tier II rates of reimbursement for all meals served to enrolled children.
  - (12) The responsibility of the sponsoring organization, upon the request of a tier II day care home, to collect applications and determine the eligibility of enrolled children for free or reduced price meals.
- (c) Each day care home shall serve one or more of the following meal types:
    - (1) Breakfast,
    - (2) Lunch,
    - (3) Supper and
    - (4) Supplemental food.Reimbursement shall not be claimed for more than two meals and one supplement provided daily to each child.
  - (d) Each day care home participating in the program shall serve the meal types specified in its approved application in accordance with the meal pattern requirements specified in §226.20. Menu records shall be maintained to document compliance with these requirements. Meals shall be served at no separate charge to enrolled children;
  - (e) Each day care home shall maintain daily records of the number of children in attendance and the number of meals, by type, served to enrolled children. Each tier II day care home in which the provider elects to have the sponsoring organization identify enrolled children who are eligible for free or reduced price meals, and in which the sponsoring organization employs a

meal counting and claiming system in accordance with §226.13(d)(3)(i), shall maintain and submit each month to the sponsoring organization daily records of the number and types of meals served to each enrolled child by name. Payment may be made for meals served to the provider's own children only when (1) such children are enrolled and participating in the child care program during the time of the meal service, (2) enrolled nonresident children are present and participating in the child care program and (3) providers' children are eligible to receive free or reduced-price meals. Reimbursement may not be claimed for meals served to children who are not enrolled, or for meals served at any one time to children in excess of the home's authorized capacity or for meals served to providers' children who are not eligible for free or reduced-price meals.

(f) The State agency may not require a day care home or sponsoring organization to maintain documentation of home operating costs.

(g) Each day care home shall comply with the recordkeeping requirements established in §226.10(d) and in this section. Failure to maintain such records shall be grounds for the denial of reimbursement.

[47 FR 36527, Aug. 20, 1982, as amended by Amdt. 5, 49 FR 18989, May 4, 1984; 50 FR 8580, Mar. 4, 1985; 52 FR 36907, Oct. 2, 1987; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 61 FR 25554, May 22, 1996; 62 FR 903, Jan. 7, 1997; 63 FR 9105, Feb. 24, 1998; 63 FR 9729, Feb. 26, 1998; 64 FR 72261, Dec. 27, 1999]

#### **§226.19 Outside-school-hours care center provisions.**

(a) Outside-school-hours care centers may participate in the Program either as independent centers or under the auspices of a sponsoring organization; *Provided, however,* That public and private nonprofit centers shall not be eligible to participate in the Program under the auspices of a for-profit sponsoring organization. Outside-school-hours care centers participating as independent centers shall comply with the provisions of §226.15.

(b) All outside-school-hours care centers, independent or sponsored, shall meet the following requirements:

(1) Outside-school-hours care centers shall have current Federal, State or local licensing or approval to provide organized child care services to enrolled school-age children outside of school hours. The main purpose of the Program shall be the care and supervision of children. Outside-school-hours care centers which are complying with applicable procedures to renew licensing or approval may participate in the Program during the renewal process, unless the State agency has information which indicates the renewal will be denied. If licensing or approval is not available, an outside-school-hours care center may participate in the Program if:

(i) It receives title XX funds for providing child care; or

(ii) It demonstrates compliance with CACFP child care standards or any applicable State or local child care standards to the State agency.

(2) Except for proprietary title XX centers, outside-school-hours care centers shall be public, or have tax-exempt status under the Internal Revenue Code of 1986, or be moving toward compliance with the requirements for tax-exempt status, or be currently participating in another Federal program requiring nonprofit status. Centers which have applied to IRS for tax-exempt status may participate in the Program while their application is pending review by IRS. If IRS denies the application, the center shall immediately notify the State agency of such denial and the State agency shall terminate the participation of the center. If IRS certification of nonprofit status has not been received within 12 months of filing the application with IRS and IRS indicates that

the center has failed to provide all required information, the State agency shall terminate the participation of the center in the Program until such time as IRS certification is obtained.

(3) Nonresidential public or private nonprofit schools which provide organized child care programs for school children may participate in the Program as outside-school-hours care centers if:

(i) Children are enrolled in a regularly scheduled child care program which meets the criteria of paragraph (b)(1) of this section. The program is organized for the purpose of providing child care services and is distinct from any extracurricular programs organized primarily for scholastic, cultural, and athletic purposes; and

(ii) Separate Program records are maintained.

(4) Outside-school-hours care centers shall be eligible to serve one or more of the following meal types: breakfasts, supplements and suppers. In addition, outside-school-hours care centers shall be eligible to serve lunches to enrolled children during periods of school vacation, including weekends and holidays, and to enrolled children attending schools which do not offer a lunch program. Notwithstanding the eligibility of outside-school-hours care centers to serve Program meals to children on school vacation, including holidays and weekends, such centers shall not operate under the Program on weekends only.

(5) Each outside-school-hours care center participating in the Program shall claim only the meal types specified in its approved application and served in compliance with the meal pattern requirements of §226.20. Reimbursement shall not be claimed for more than two meals and one supplement provided daily to each child, except that reimbursement may be claimed for two meals and two supplements or three meals and one supplement served to a child for each day in which that child is maintained in care for eight or more hours. In addition, reimbursement shall not be claimed for meals served to children who are not enrolled, for meals served to children at any one time in excess of authorized capacity, or for any meal served at a proprietary title XX center during a calendar month when less than 25 percent of enrolled children or 25 percent of licensed capacity, whichever is less, were title XX beneficiaries.

(6) Three hours shall elapse between the beginning of one meal service and the beginning of another, except that 4 hours shall elapse between the service of a lunch and supper when no supplement is served between lunch and supper. The service of a supper shall begin no later than 7 p.m. and end no later than 8 p.m. The duration of the meal service shall be limited to 2 hours for lunches and supper and 1 hour for other meals.

(7) Each outside-school-hours care center shall ensure that each meal service is supervised by an adequate number of operational personnel trained in Program requirements. Operational personnel shall ensure that:

(i) Meals are served only to children enrolled for care and adults who perform necessary food service labor; (ii) meals served to children meet the meal pattern requirements specified in §226.20; (iii) each meal service is consistent with the meal time requirements of paragraph (b)(7) of this section; (iv) meals served are consumed on the premises of the centers; (v) accurate records are maintained; and (vi) the number of meals prepared or ordered is promptly adjusted on the basis of participation trends.

(8) Each outside-school-hours care center shall accurately maintain the following records:

(i) Documentation of enrollment for all children, including information used to determine eligibility for free or reduced price meals in accordance with §226.23(e)(1);

(ii) Number of meals prepared or delivered for each meal service;

(iii) Daily menu records for each meal service;

- (iv) Number of meals served to enrolled children at each meal service;
  - (v) Number of enrolled children in attendance during each meal service;
  - (vi) Number of meals served to adults performing necessary food service labor for each meal service; and
  - (vii) All other records required by the State agency financial management system.
- (9) An outside-school-hours care center may utilize existing school food service facilities or obtain meals from a school food service facility, and the pertinent requirements of this part shall be embodied in a written agreement between the outside-school-hours care center and the school. The center shall maintain responsibility for all Program requirements set forth in this part.
- (c) Each outside-school-hours care center shall comply with the recordkeeping requirements established in §226.10(d), in paragraph (b) of this section and, if applicable, in §226.15(e). Failure to maintain such records shall be grounds for the denial of reimbursement.
- [47 FR 36527, Aug. 20, 1982, as amended at 52 FR 36907, Oct. 2, 1987; 54 FR 26724, June 26, 1989; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 56 FR 58175, Nov. 16, 1991; 61 FR 25554, May 22, 1996; 62 FR 23619, May 1, 1997; 64 FR 72261, Dec. 27, 1999]

#### **§226.19a Adult day care center provisions.**

- (a) Adult day care centers may participate in the Program either as independent centers or under the auspices of a sponsoring organization; provided, however, that public and private nonprofit centers shall not be eligible to participate in the Program under the auspices of a for-profit sponsoring organization. Adult day care centers participating as independent centers shall comply with the provisions of §226.15.
- (b) All adult day care centers, independent or sponsored, shall meet the following requirements:
- (1) Adult day care centers shall provide a community-based group program designed to meet the needs of functionally impaired adults through an individual plan of care. Such a program shall be a structured, comprehensive program that provides a variety of health, social and related support services to enrolled adult participants.
  - (2) Adult day care centers shall provide care and services directly or under arrangements made by the agency or organization whereby the agency or organization maintains professional management responsibility for all such services.
  - (3) Adult day care centers shall have Federal, State or local licensing or approval to provide day care services to functionally impaired adults (as defined in §226.2) or individuals 60 years of age or older in a group setting outside their home or a group living arrangement on a less than 24-hour basis. Adult day care centers which are complying with applicable procedures to renew licensing or approval may participate in the Program during the renewal process, unless the State agency has information which indicates that renewal will be denied.
  - (4) Except for proprietary title XIX or title XX centers, adult day care centers shall be public, or have tax-exempt status under the Internal Revenue Code of 1986, or be moving toward compliance with the requirements for tax-exempt status, or be currently operating another Federal program requiring nonprofit status. An adult day care center which has applied to the Internal Revenue Service (IRS) for tax-exempt status may participate in the Program while its application is pending review by IRS. If IRS denies the application for tax-exempt status, the adult day care center shall immediately notify the State agency of such denial and the State agency shall terminate the participation of the center. If IRS certification of nonprofit status has not been received within 12 months of filing the application with IRS, and IRS indicates that the

adult day care center has failed to provide all required information, the State agency shall terminate the participation of the adult day care center until such time as IRS tax-exempt status is obtained.

(5) Each adult day care center participating in the Program shall serve one or more of the following meal types:

- (i) Breakfast,
- (ii) Lunch,
- (iii) Supper, and
- (iv) Supplemental food.

Reimbursement shall not be claimed for more than two meals and one supplement provided daily to each adult participant.

(6) Each adult day care center participating in the Program shall claim only the meal types specified in its approved application in accordance with the meal pattern requirements specified in §226.20. Participating centers may not claim CACFP reimbursement for meals claimed under part C of title III of the Older Americans Act of 1965. Reimbursement may not be claimed for meals served to persons who are not enrolled, or for meals served to participants at any one time in excess of the center's authorized capacity, or for any meal served at a proprietary title XIX or title XX center during a calendar month when less than 25 percent of enrolled participants were title XIX or title XX beneficiaries. Menus and any other nutritional records required by the State agency shall be maintained to document compliance with such requirements.

(7) An adult day care center may obtain meals from a school food service facility, and the pertinent requirements of this part shall be embodied in a written agreement between the center and school. The center shall maintain responsibility for all Program requirements set forth in this part.

(8) Adult day care centers shall collect and maintain documentation of the enrollment of each adult participant including information used to determine eligibility for free and reduced price meals in accordance with §226.23(e)(1).

(9) Each adult day care center shall maintain daily records of the number of meals by type (breakfast, lunch, supper, and supplements) served to enrolled participants, and to adults performing labor necessary to the food service.

(10) Each adult day care center shall maintain records on the age of each enrolled person. In addition, each adult day care center shall maintain records which demonstrate that each enrolled person under the age of 60 meets the functional impairment eligibility requirements established under the definition of "functionally impaired adult" contained in this part. Finally, each adult day care center shall maintain records which document that qualified adult day care participants reside in their own homes (whether alone or with spouses, children or guardians) or in group living arrangements as defined in §226.2.

(c) Each adult day care center shall comply with the recordkeeping requirements established in §226.10(d), in paragraph (b) of this section and, if applicable, in §226.15(e). Failure to maintain such records shall be grounds for the denial of reimbursement.

[53 FR 52591, Dec. 28, 1988, as amended by Amdt. 22, 55 FR 1378, Jan. 14, 1990; 61 FR 25554, May 22, 1996; 62 FR 23619, May 1, 1997; 64 FR 72261, Dec. 27, 1999]

## **§226.20 Requirements for meals.**

(a) Except as otherwise provided in this section, each meal served in the Program shall contain, as a minimum, the indicated food components:

(1) A breakfast shall contain: (i) Fluid milk as a beverage or on cereal, or used in part for each purpose;

(ii) Vegetable(s) or fruit(s) or full-strength vegetable or fruit juice, or any combination of these foods;

(iii) Whole-grain or enriched bread; or cornbread, biscuits, rolls, muffins, etc., made with whole-grain or enriched meal or flour; or whole-grain or enriched or fortified cereal; or cooked whole-grain or enriched pasta or noodle products such as macaroni, or cereal grains such as rice, bulgur, or corn grits; or any combination of these foods.

(2) Lunch shall contain: (i) Fluid milk as a beverage;

(ii)(A) Lean meat, poultry or fish; alternate protein products; or cheese; or an egg; or cooked dry beans or peas; or peanut butter; or any combination of these foods. These foods must be served in a main dish, or in a main dish and one other menu item, to meet this requirement. Cooked dry beans or dry peas may be used as the meat alternate or as part of the vegetable/fruit component but not as both food components in the same meal;

(B) Nuts and seeds and their butters listed in program guidance are nutritionally comparable to meat or other meat alternates based on available nutritional data. Acorns, chestnuts, and coconuts shall *not* be used as meat alternates due to their low protein content. Nut or seed meals or flours may be used as an ingredient in a bread/bread alternate, but shall *not* be used as a meat alternate except as defined in this part under Appendix A: Alternate Foods for Meals, and in program guidance materials. As noted in paragraph (c)(2) of this section, nuts or seeds may be used to meet no more than one-half of the meat/meat alternate requirements. Therefore, nuts or seeds must be combined with another meat/meat alternate to fulfill the requirement;

(C) Yogurt may be used to meet all or part of the meat/meat alternate requirement. Yogurt served may be either plain or flavored, unsweetened or sweetened. Noncommercial and/or nonstandardized yogurt products, such as frozen yogurt, homemade yogurt, yogurt flavored products, yogurt bars, yogurt covered fruit and/or nuts or similar products shall not be credited. Four ounces (weight) or 1/2 cup (volume) of yogurt fulfills the equivalent of one ounce of the meat/meat alternate requirement in the meal pattern.

(iii) Two or more vegetables or fruits, or a combination of both. Full-strength vegetable or fruit juice may be counted to meet not more than one-half of this requirement;

(iv) Whole-grain or enriched bread; or cornbread, biscuits, rolls, muffins, etc., made with whole-grain or enriched meal or flour; or whole-grain or enriched pasta or noodle products such as macaroni, or cereal grains such as rice, bulgur, or corn grits; or any combination of these foods.

(3) Supper shall contain the food components and servings listed for lunch in §226.20(a)(2), except that, for adult participants in adult day care centers, it does not require a serving of fluid milk.

(4) Supplemental food shall contain two of the following four components:

(i) Fluid milk as a beverage, or on cereal, or used in part for each purpose;

(ii) Meat or meat alternate. Nuts and seeds and their butters listed in program guidance are nutritionally comparable to meat or other meat alternates based on available nutritional data. Acorns, chestnuts, and coconuts are excluded and shall *not* be used as meat alternates due to their low protein content. Nut or seed meals or flours shall *not* be used as a meat alternate except as defined in this part under Appendix A: Alternate Foods for Meals;

(iii) Vegetable(s) or fruit(s) or full-strength vegetable or fruit juice, or any combination of these foods. For children, juice may not be served when milk is served as the only other component;

(iv) Whole-grain or enriched bread; or cornbread, biscuits, rolls, muffins, etc., made with whole-grain or enriched meal or flour; or cooked whole-grain or enriched pasta or noodle products such as macaroni, or cereal grains such as rice, bulgar, or corn grits; or any combination of these foods.

(b) *Infant meal pattern.* When infants from birth through 11 months of age participate in the Program, an infant meal shall be offered. Foods within the infant meal pattern shall be of texture and consistency appropriate for the particular age group being served, and shall be served during a span of time consistent with the infant's eating habits. For infants 4 through 7 months of age, solid foods are optional and should be introduced only if the infant is developmentally ready. Whenever possible the child care facility should consult with the infant's parent in making the decision to introduce solid foods. Solid foods should be introduced one at a time on a gradual basis with the intent of ensuring health and nutritional well-being. For infants 8 through 11 months of age, the total amount of food authorized in the meal patterns set forth below must be provided in order to qualify for reimbursement. Additional foods may be served to infants 4 months of age and older with the intent of improving their overall nutrition. Breast milk, provided by the infant's mother, may be served in place of infant formula from birth through 11 months of age. Either breast milk or iron-fortified infant formula shall be served for the entire first year. For some breastfed infants who regularly consume less than the minimum amount of breast milk per feeding, a serving of less than the minimum amount of breast milk may be offered. In these situations, additional breast milk must be offered if the infant is still hungry. Juice should not be offered to infants until they are ready to drink from a cup, in order to develop behaviors that may prevent baby bottle tooth decay. The infant meal pattern shall contain, as a minimum, each of the following components in the amounts indicated for the appropriate age group:

- (1) Birth through 3 months.
  - (i) Breakfast -- 4 to 6 fluid ounces of breast milk or iron-fortified infant formula;
  - (ii) Lunch or supper -- 4 to 6 fluid ounces of iron-fortified infant formula;
  - (iii) Supplemental food -- 4 to 6 fluid ounces of iron-fortified infant formula.
- (2) 4 through 7 months.
  - (i) Breakfast -- 4 to 8 fluid ounces of breast milk or iron-fortified infant formula; and 0 to 3 tablespoons of iron-fortified dry infant cereal (optional);
  - (ii) Lunch or supper -- 4 to 8 fluid ounces of iron-fortified infant formula; and 0 to 3 tablespoons of iron-fortified dry infant cereal (optional); and 0 to 3 tablespoons of fruit or vegetable of appropriate consistency or a combination of both (optional);
  - (iii) Supplemental food -- 4 to 6 fluid ounces of iron-fortified infant formula.
- (3) 8 through 11 months.
  - (i) Breakfast -- 6 to 8 fluid ounces of breast milk or iron-fortified infant formula; 2 to 4 tablespoons of iron-fortified dry infant cereal; and 1 to 4 tablespoons of fruit or vegetable of appropriate consistency or a combination of both;
  - (ii) Lunch or supper -- 6 to 8 fluid ounces of breast milk or iron-fortified infant formula; 2 to 4 tablespoons of iron-fortified dry infant cereal and/or 1 to 4 tablespoons of meat, fish, poultry, egg yolk, or cooked dry beans or peas, or 1/2 to 2 ounces (weight) of cheese or 1 to 4 ounces (weight or volume) of cottage cheese or cheese food or cheese spread of appropriate consistency; and 1 to 4 tablespoons of fruit or vegetable of appropriate consistency or a combination of both;
  - (iii) Supplemental food -- 2 to 4 fluid ounces of iron-fortified infant formula, breast milk, or full strength fruit juice and 0 to 1/2 slice of crusty bread (optional) or 0 to 2 cracker type products

(optional) made from whole-grain or enriched meal or flour and which are suitable for an infant for use as a finger food.

(4) The minimum amount of food components to be served as breakfast, lunch, supper or supplement as set forth in paragraphs (b), (1), (2), and (3) of this section are as follows:

(c) *Meal patterns for children age one through 12 and adult participants.* When individuals over age one participate in the Program, the total amount of food authorized in the meal patterns set forth below shall be provided in order to qualify for reimbursement.

(1) *Breakfast.* The minimum amount of food components to be served as breakfast as set forth in paragraph (a)(1) of this section are as follows:



(2) *Lunch*. The minimum amount of food components to be served as lunch as set forth in paragraph (a)(2) of this section are as follows:



(3) *Supper*. The minimum amount of food components to be served as supper as set forth in paragraph (a)(3) of this section are as follows:

(4) *Supplemental food.* The minimum amount of food components to be served as supplemental foods as set forth in paragraph (a)(4) of this section are as follows. Select two of the following four components. (For children, juice may not be served when milk is served as the only other component.)

(d) *Additional food.* To improve the nutrition of participating children over 1 year of age additional foods may be served with each meal as follows:

(1) *Breakfast.* Include as often as practical one-half egg; or a 1-ounce serving (edible portion as served) of meat, poultry or fish; or 1-ounce of cheese; or 2 tablespoons of peanut butter; or 4 oz. of yogurt; or an equivalent quantity of any combination of these foods. Additional foods may be served as desired.

(2) *Lunch, supper or supplemental food.* Additional foods may be served as desired.

(e) *Temporary unavailability of milk.* If emergency conditions prevent an institution normally having a supply of milk from temporarily obtaining milk deliveries, the State agency may approve the service of breakfasts, lunches, or suppers without milk during the emergency period.

(f) *Continuing unavailability of milk.* The inability of an institution to obtain a supply of milk on a continuing basis shall not bar it from participation in the Program. In such cases, the State agency may approve service of meals without milk, provided that an equivalent amount of canned, whole dry or nonfat dry milk is used in the preparation of the components of the meal set forth in paragraphs (a)(1), (2) and (3) of this section.

(g) *Statewide substitutions.* In American Samoa, Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands the following variations from the meal requirements are authorized: A serving of a starchy vegetable, such as yams, plantains, or sweet potatoes may be substituted for the bread requirements.

(h) *Individual substitutions.* Substitutions may be made in food listed in paragraphs (b) and (c) of this section if individual participants are unable, because of medical or other special dietary needs, to consume such foods. Substitutions because of medical needs shall be made only when supported by a statement from a recognized medical authority which includes recommended alternate foods.

(i) *Special variations.* FNS may approve variations in the food components of the meals on an experimental or a continuing basis in any institution where there is evidence that such variations are nutritionally sound and are necessary to meet ethnic, religious, economic, or physical needs.

(j) *Meal planning.* Institutions shall plan for and order meals on the basis of current participation trends, with the objective of providing only one meal per participant at each meal service. Records of participation and of ordering or preparing meals shall be maintained to demonstrate positive action toward this objective. In recognition of the fluctuation in participation levels which makes it difficult to estimate precisely the number of meals needed and to reduce the resultant waste, any excess meals that are ordered may be served to participants and may be claimed for reimbursement, unless the State agency determines that the institution has failed to plan and prepare or order meals with the objective of providing only one meal per participant at each meal service.

(k) *Sanitation.* Institutions shall ensure that in storing, preparing, and serving food, proper sanitation and health standards are met which conform with all applicable State and local laws and regulations. Institutions shall ensure that adequate facilities are available to store food or hold meals.

(l) *Donated commodities.* Institutions shall efficiently use in the Program any foods donated by the Department and accepted by the institution.

(m) *Plentiful foods.* Institutions shall, insofar as practical, purchase and efficiently use in the Program foods designated as plentiful by the Department.

(n) *Additional provision.* The State agency may allow institutions which serve meals prepared in schools participating in the National School Lunch and School Breakfast Programs to substitute

the meal pattern requirements of the regulations governing those Programs (7 CFR part 210 and 7 CFR part 220, respectively) for the meal pattern requirements contained in this section.

(o) *Family-style meal service*. Meals may be served in a family-style setting.

(p) *Offer versus serve*. (1) Each adult day care center shall *offer* its adult participants all of the required food servings as set forth in paragraph (c)(1), (c)(2) and (c)(3) of this section. However, at the discretion of the adult day care center, adult participants may be permitted to *decline*:

(i) *One of the four* food items (one serving of milk, one serving of vegetable and/or fruit, and two servings of bread or bread alternate) required at breakfast;

(ii) *Two of the six* food items (one serving of milk, two servings of vegetable and/or fruit, two servings of bread or bread alternate, and one serving of meat or meat alternate) required at lunch;

(iii) *Two of the five* food items (two servings of vegetables and/or fruit, two servings of bread or bread alternate, and one serving of meat or meat alternate) required at supper.

(2) The price of a reimbursable meal shall not be affected if an adult participant declines a food item.

[47 FR 36527, Aug. 20, 1982; 48 FR 40197, Sept. 16, 1983, as amended at 50 FR 8581, Mar. 4, 1985; 51 FR 16811, May 7, 1986; 51 FR 23515, June 30, 1986; 53 FR 25308, July 6, 1988; 53 FR 48632, Dec. 2, 1988; 53 FR 52592, Dec. 28, 1988; 54 FR 27153, June 28, 1989; 58 FR 37850, July 14, 1993; 62 FR 10191, Mar. 6, 1997; 64 FR 61775, Nov. 15, 1999; 64 FR 72261, Dec. 27, 1999; 65 FR 12439, Mar. 9, 2000; 66 FR 65597, Dec. 20, 2001]

#### **§226.21 Food service management companies.**

(a) Any institution may contract with a food service management company. An institution which contracts with a food service management company shall remain responsible for ensuring that the food service operation conforms to its agreement with the State agency. All procurements of meals from food service management companies shall adhere to the procurement standards set forth in §226.22. Public institutions shall follow applicable State or local laws governing bid procedures. In the absence of any applicable State or local laws, and in addition to the procurement provisions set forth in §226.22, the State agency may mandate that each institution with Program meal contracts of an aggregate value in excess of \$10,000 formally advertise such contracts and comply with the following procedures intended to prevent fraud, waste, and Program abuse:

(1) All proposed contracts shall be publicly announced at least once 14 calendar days prior to the opening of bids. The announcement shall include the time and place of the bid opening;

(2) The institution shall notify the State agency at least 14 calendar days prior to the opening of the bids of the time and place of the bid opening;

(3) The invitation to bid shall not provide for loans or any other monetary benefit or terms or conditions to be made to institutions by food service management companies;

(4) Nonfood items shall be excluded from the invitation to bid, except where such items are essential to the conduct of the food service;

(5) The invitation to bid shall not specify special meal requirements to meet ethnic or religious needs unless special requirements are necessary to meet the needs of the participants to be served;

(6) The bid shall be publicly opened;

(7) All bids totaling \$50,000 or more shall be submitted to the State agency for approval before acceptance. All bids shall be submitted to the State agency for approval before accepting a bid

which exceeds the lowest bid. State agencies shall respond to any request for approval within 10 working days of receipt;

(8) The institutions shall inform the State agency of the reason for selecting the food service management company chosen. State agencies may require institutions to submit copies of all bids submitted under this section.

(b) The institution and the food service management company shall enter into a standard contract as required by §226.6(i). However, public institutions may, with the approval of the State agency, use their customary form of contract if it incorporates the provisions of §226.6(i).

(c) A copy of the contract between each institution and food service management company shall be submitted to the State agency prior to the beginning of Program operations under the subject contract.

(d) Each proposed additional provision to the standard form of contract shall be submitted to the State agency for approval.

(e) A food service management company may not subcontract for the total meal, with or without milk, or for the assembly of the meal.

[47 FR 36527, Aug. 20, 1982, as amended at 53 FR 52594, Dec. 28, 1988]

#### **§226.22 Procurement standards.**

(a) This section establishes standards and guidelines for the procurement of foods, supplies, equipment, and other goods and services. These standards are furnished to ensure that such materials and services are obtained efficiently and economically and in compliance with the provisions of applicable Federal law and Executive orders.

(b) These standards shall not relieve the institution of any contractual responsibilities under its contracts. The institution is responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements entered into in support of the Program. These include, but are not limited to: source evaluation, protests of award, disputes, and claims. Violations of the law shall be referred to the local, State, or Federal authority having proper jurisdiction.

(c) Institutions may use their own procurement procedures which reflect applicable State or local laws and regulations, provided that procurements made with Program payments conform to the standards set forth in this section and in Attachment O of Office of Management and Budget Circulars A-102 and A-110, as well as to procurement requirements which may be established by the State agency, with the approval of FNS to prevent fraud, waste, and Program abuse.

(d) Institutions shall maintain a written code of standards of conduct which shall govern the performance of their officers, employees or agents engaged in the award and administration of contracts supported by Program payments. No employee, officer or agent of the grantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(1) The employee, officer or agent;

(2) Any member of his immediate family;

(3) His or her partner; or

(4) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award.

The institution's officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Institutions may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards of conduct shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the institution's officers, employees, or agents, or by contractors or their agents.

(e) The institution shall establish procurement procedures which provide that proposed procurement actions shall be reviewed by institution officials to avoid the purchase of unnecessary or duplicative items. Where appropriate, an analysis shall be made of lease versus purchase alternatives, and any other appropriate analysis to determine which approach would be the most economical.

(f) Affirmative steps shall be taken to assure that small and minority businesses are utilized when possible. Affirmative steps shall include the following:

(1) Including qualified small and minority businesses on solicitation lists;

(2) Assuring that small and minority businesses are solicited whenever they are potential sources;

(3) When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum small and minority business participation;

(4) Where the requirement permits, establishing delivery schedules which will encourage participation by small and minority businesses;

(5) Using the services and assistance of the Small Business Administration and the Minority Business Enterprise of the Department of Commerce as required;

(6) If any subcontracts are to be let, requiring the prime contractor to take the affirmative steps in paragraphs (b) (1) through (5) of this section; and

(7) Taking similar appropriate affirmative action in support of women's business enterprises.

(g) All procurement transactions, regardless of whether by sealed bids or by negotiation and without regard to dollar value, shall be conducted in a manner that provides maximum open and free competition consistent with this section. Procurement procedures shall not restrict or eliminate competition. Examples of what is considered to be restrictive of competition include, but are not limited to (1) placing unreasonable requirements on firms in order for them to qualify to do business, (2) noncompetitive practices between firms, (3) organizational conflicts of interest, and (4) unnecessary experience and bonding requirements.

(h) The institution shall have written selection procedures which shall provide, as a minimum, the following procedural requirements:

(1) Solicitations of offers, whether by competitive sealed bids or competitive negotiation, shall:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Clearly set forth all requirements which offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(2) Awards shall be made only to responsible contractors that possess the potential ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(i) Program procurements shall be made by one of the following methods:

(1) Small purchase procedures are those relatively simple and informal procurement methods that are sound and appropriate for the procurement of services, supplies or other property, costing in the aggregate not more than \$10,000. Institutions shall comply with State or local small purchase dollar limits under \$10,000. If small purchase procedures are used for a procurement under the Program, price or rate quotation shall be obtained from an adequate number of qualified sources; or

(2) In competitive sealed bids (formal advertising), sealed bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price.

(i) In order for formal advertising to be feasible, appropriate conditions must be present, including as a minimum, the following:

(A) A complete, adequate and realistic specification or purchase description is available.

(B) Two or more responsible suppliers are willing and able to compete effectively for the institution's business.

(C) The procurement lends itself to a firm-fixed price contract, and selection of the successful bidder can appropriately be made principally on the basis of price.

(ii) If formal advertising is used for a procurement under the Program, the following requirements shall apply:

(A) A sufficient time prior to the date set for opening of bids, bids shall be solicited from an adequate number of known suppliers. In addition, the invitation shall be publicly advertised.

(B) The invitation for bids, including specifications and pertinent attachments, shall clearly define the items or services needed in order for the bidders to properly respond to the invitation.

(C) All bids shall be opened publicly at the time and place stated in the invitation for bids.

(D) A firm-fixed-price contract award shall be made by written notice to that responsible bidder whose bid, conforming to the invitation for bids, is lowest. Where specified in the bidding documents, factors such as discounts, transportation costs and life cycle costs shall be considered in determining which bid is lowest. Payment discounts may only be used to determine low bid when prior experience of the grantee indicates that such discounts are generally taken.

(E) Any or all bids may be rejected when there are sound documented business reasons in the best interest of the Program.

(3) In competitive negotiation, proposals are requested from a number of sources and the Request for Proposal is publicized. Negotiations are normally conducted with more than one of the sources submitting offers, and either a fixed-price or cost-reimbursable type contract is awarded, as appropriate. Competitive negotiation may be used if conditions are not appropriate for the use of formal advertising. If competitive negotiation is used for a procurement under a grant, the following requirements shall apply:

(i) Proposals shall be solicited from an adequate number of qualified sources to permit reasonable competition consistent with the nature and requirements of the procurement. The

Request for Proposals shall be publicized and reasonable requests by other sources to compete shall be honored to the maximum extent practicable:

(ii) The Request for Proposal shall identify all significant evaluation factors, including price or cost where required and their relative importance;

(iii) The institution shall provide mechanisms for technical evaluation of the proposal received, determinations of responsible offerors for the purpose of written or oral discussions, and selection for contract award; and

(iv) Award may be made to the responsible offeror whose proposal will be most advantageous to the procuring party, price and other factors considered. Unsuccessful offerors should be notified promptly.

(4) Noncompetitive negotiation is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. Noncompetitive negotiation may be used when the award of a contract is infeasible under small purchase, competitive bidding (formal advertising), or competitive negotiation procedures. Circumstances under which a contract may be awarded by noncompetitive negotiation are limited to the following:

(i) The item is available only from a single source;

(ii) Public exigency or emergency when the urgency for the requirement will not permit a delay incident to competitive solicitation;

(iii) FNS authorizes noncompetitive negotiation; or

(iv) After solicitation of a number of sources, competition is determined inadequate.

(j) The cost plus a percentage of cost method of contracting shall not be used. Instructions shall perform some form of cost or price analysis in connection with every procurement action including contract modifications. Costs or prices based on estimated costs for contracts under the Program shall be allowed only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles.

(k) Institutions shall maintain records sufficient to detail the significant history of a procurement. These records shall include, but are not necessarily limited to information pertinent to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the cost or price.

(l) In addition to provisions defining a sound and complete procurement contract, institutions shall include the following contract provisions or conditions in all procurement contracts and subcontracts as required by the provision, Federal Law or FNS:

(1) Contracts other than small purchases shall contain provisions or conditions which will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate;

(2) All contracts in excess of \$10,000 shall contain suitable provisions for termination by the institution including the manner by which it will be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor;

(3) All contracts awarded in excess of \$10,000 by institutions and their contractors shall contain a provision requiring compliance with Executive Order 11246, entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (41 CFR part 60);

(4) Where applicable, all contracts awarded by institutions in excess of \$2,500 which involve the employment of mechanics or laborers shall include a provision for compliance with section 103 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327 through 330) as supplemented by Department of Labor regulations (29 CFR part 5). Under section 103 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work day of 8 hours and a standard work week of 40 hours. Work in excess of the standard work day or week is permissible provided that the worker is compensated at a rate of not less than 1 1/2 times the basic rate of pay for all hours worked in excess of 8 hours in any calendar day or 40 hours in the work week. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence;

(5) The contract shall include notice of USDA requirements and regulations pertaining to reporting and patent rights under any contract involving research, developmental, experimental or demonstration work with respect to any discovery or invention which arises or is developed in the course of or under such contract, and of USDA requirements and regulations pertaining to copyrights and rights in data. These requirements are in §3015.175 of the USDA Uniform Federal Assistance Regulations 7 CFR part 3015. All negotiated contracts (except those awarded by small purchases procedures) awarded by institutions shall include a provision to the effect that the institution, FNS, the Comptroller General of the United States or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract, for the purpose of making audit, examination, excerpts, and transcriptions. Institutions shall require contractors to maintain all required records for three years after institutions make final payment and all other pending matters are closed;

(6) Contracts and subcontracts of amounts in excess of \$100,000 shall contain a provision which requires compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1837(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15), which prohibit the use under nonexempt Federal contracts, grants or loans of facilities included on the EPA List of Violating Facilities. The provision shall require reporting of violations to FNS and to the U.S. EPA Assistant Administrator for Enforcement (EN-329); and

(7) Contracts shall recognize mandatory standards and policies relating to energy efficiency which are contained in the State energy efficiency conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).

(m) Institutions shall maintain a contract administration system insuring that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

### **§226.23 Free and reduced-price meals.**

(a) The State agency shall require each institution to submit, at the time the institution applies for Program participation, a written policy statement concerning free and reduced-price meals to be used uniformly in all child care and adult day care facilities under its jurisdiction as required in this section. Institutions shall not be approved for participation nor agreements renewed unless the free and reduced-price policy statement has been approved. Pending approval of a revision of a policy statement, the existing policy shall remain in effect.

(b) Sponsoring organizations of day care homes (which may not serve meals at a separate charge to children) and other institutions which elect to serve meals at no separate charge, shall develop

a policy statement consisting of an assurance to the State agency that all participants are served the same meals at no separate charge, regardless of race, color, national origin, sex, age, or handicap and that there is no discrimination in the course of the food service. This statement shall also contain an assurance that there will be no identification of children in day care homes in which meals are reimbursed at both the tier I and tier II reimbursement rates, and that the sponsoring organization will not make any free and reduced price eligibility information concerning individual households available to day care homes and will otherwise limit the use of such information to persons directly connected with the administration and enforcement of the Program.

(c) Independent centers and sponsoring organizations of centers which charge separately for meals shall develop a policy statement for determining eligibility for free and reduced-price meals which shall include the following:

(1) The specific criteria to be used in determining eligibility for free and reduced-price meals.

The institution's standards of eligibility shall conform to the Secretary's income standards;

(2) A description of the method or methods to be used in accepting applications from families for free and reduced-price meals. Such methods will ensure that applications are accepted from households on behalf of children who are members of AFDC assistance units or food stamp or FDPIR households or, for adult participants, who are members of a food stamp or FDPIR household or SSI or Medicaid participants;

(3) A description of the method or methods to be used to collect payments from those participants paying the full or reduced price of the meal which will protect the anonymity of the participants receiving a free or reduced-price meal;

(4) An assurance which provides that the institution will establish a hearing procedure for use when benefits are denied or terminated as a result of verification:

(i) A simple, publicly announced method for a family to make an oral or written request for a hearing;

(ii) An opportunity for the family to be assisted or represented by an attorney or other person in presenting its appeal;

(iii) An opportunity to examine, prior to and during the hearing, the documents and records presented to support the decision under appeal;

(iv) That the hearing shall be held with reasonable promptness and convenience to the family and that adequate notice shall be given to the family as to the time and place of the hearing;

(v) An opportunity for the family to present oral or documentary evidence and arguments supporting its position;

(vi) An opportunity for the family to question or refute any testimony or other evidence and to confront and cross-examine any adverse witnesses;

(vii) That the hearing shall be conducted and the determination made by a hearing official who did not participate in making the initial decision;

(viii) The determination of the hearing official shall be based on the oral and documentary evidence presented at the hearing and made a part of that hearing record;

(ix) That the family and any designated representatives shall be notified in writing of the decision of the hearing official;

(x) That a written record shall be prepared with respect to each hearing, which shall include the decision under appeal, any documentary evidence and a summary of any oral testimony presented at the hearing, the decision of the hearing official, including the reasons therefore, and a copy of the notification to the family of the decision of the hearing official; and

(xi) That such written record of each hearing shall be preserved for a period of three years and shall be available for examination by the family or its representatives at any reasonable time and place during such period;

(5) An assurance that there will be no overt identification of free and reduced-price meal recipients and no discrimination against any participant on the basis of race, color, national origin, sex, age, or handicap;

(6) An assurance that the charges for a reduced-price lunch or supper will not exceed 40 cents, that the charge for a reduced-price breakfast will not exceed 30 cents, and that the charge for a reduced-price supplement will not exceed 15 cents.

(d) Each institution shall annually provide the information media serving the area from which the institution draws its attendance with a public release. All media releases issued by institutions other than sponsoring organizations of day care homes, shall include the Secretary's Income Eligibility Guidelines for Free and Reduced-Price Meals. The release issued by all sponsoring organizations of day care homes, and by other institutions which elect not to charge separately for meals, shall announce the availability of meals at no separate charge. The release issued by child care institutions which charge separately for meals shall announce the availability of free and reduced-price meals to children meeting the approved eligibility criteria. The release issued by child care institutions shall also announce that children who are members of AFDC assistance units, food stamp or FDPIR households, or are Head Start participants are automatically eligible to receive free meal benefits. The release issued by adult day care centers which charge separately for meals shall announce the availability of free and reduced-price meals to participants meeting the approved eligibility criteria. The release issued by adult day care centers shall also announce that adult participants who are members of food stamp or FDPIR households or who are SSI or Medicaid participants are automatically eligible to receive free meal benefits. All releases shall state that meals are available to all participants without regard to race, color, national origin, sex, age or handicap.

(e)(1) *Application for free and reduced-price meals.* (i) For the purpose of determining eligibility for free and reduced price meals, institutions shall distribute applications for free and reduced price meals to the families of participants enrolled in the institution. Sponsoring organizations of day care homes shall distribute applications for free and reduced price meals to day care home providers who wish to enroll their own eligible children in the Program. At the request of a provider in a tier II day care home, sponsoring organizations of day care homes shall distribute applications for free and reduced price meals to the households of all children enrolled in the home, except that applications need not be distributed to the households of enrolled children that the sponsoring organization determines eligible for free and reduced price meals under the circumstances described in paragraph (e)(1)(vi) of this section. These applications, and any other descriptive material distributed to such persons, shall contain only the family-size income levels for reduced price meal eligibility with an explanation that households with incomes less than or equal to these levels are eligible for free or reduced price meals. Such forms and descriptive materials may not contain the income standards for free meals. However, such forms and materials distributed by child care institutions other than sponsoring organizations of day care homes shall state that, if a child is a member of a food stamp or FDPIR household or AFDC assistance unit, the child is automatically eligible to receive free Program meal benefits, subject to the completion of the application as described in paragraph (e)(1)(ii) of this section; such forms and materials distributed by sponsoring organizations of day care homes shall state that, if a child or a child's parent is participating in or subsidized under a Federally or State supported

child care or other benefit program with an income eligibility limit that does not exceed the eligibility standard for free or reduced price meals, meals served to the child are automatically eligible for tier I reimbursement, subject to the completion of the application as described in paragraph (e)(1)(ii) of this section, and shall list any programs identified by the State agency as meeting this standard; such forms and materials distributed by adult day care centers shall state that, if an adult participant is a member of a food stamp or FDPIR household or is a SSI or Medicaid participant, the adult participant is automatically eligible to receive free Program meal benefits, subject to the completion of the application as described in paragraph (e)(1)(iii) of this section. Sponsoring organizations of day care homes shall not make free and reduced price eligibility information concerning individual households available to day care homes and shall otherwise limit the use of such information to persons directly connected with the administration and enforcement of the Program. However, sponsoring organizations may inform tier II day care homes of the number of identified income-eligible enrolled children. If a State agency distributes, or chooses to permit its sponsoring organizations to distribute, applications to the households of children enrolled in tier II day care homes which include household confidentiality waiver statements, such applications shall include a statement informing households that their participation in the program is not dependent upon signing the waivers. Furthermore, such forms and materials distributed by child care institutions shall state that if a child is a Head Start participant, the child is automatically eligible to receive free Program meal benefits, subject to submission by Head Start officials of a Head Start statement of income eligibility or income eligibility documentation.

(ii) Except as provided in paragraph (e)(1)(iv) of this section, the application for children shall contain a request for the following information:

(A) The names of all children for whom application is made;

(B) The names of all other household members;

(C) The social security number of the adult household member who signs the application, or an indication that he/she does not possess a social security number;

(D) The income received by each household member identified by source of income (such as earnings, wages, welfare, pensions, support payments, unemployment compensation, social security, and other cash income received or withdrawn from any other source, including savings, investments, trust accounts, and other resources);

(E) A statement to the effect that "In certain cases, foster children are eligible for free and reduced-price meals regardless of household income. If such children are living with you and you wish to apply for such meals, please contact us.";

(F) A statement that includes substantially the following information: "Unless you include your child's case number for the Food Stamp Program, the Food Distribution Program on Indian Reservations (or other identifier for the Food Distribution Program on Indian Reservations) or the Temporary Assistance for Needy Families Program, you must include the social security number of the adult household member signing the application or indicate that the household member does not have a social security number. This is required by section 9 of the National School Lunch Act. The social security number is not mandatory, but the application cannot be approved if a social security number is not given or an indication is not made that the signer does not have a social security number. The social security number will be used in the administration and enforcement of the program." State agencies and institutions must ensure that the notice complies with section 7(b) of the Privacy Act of 1974 (5 U.S.C. 552a note); and

(G) The signature of an adult member of the household which appears immediately below a statement that the person signing the application certifies that all information furnished is true and correct; that the application is being made in connection with the receipt of Federal funds; that Program officials may verify the information on the application; and that the deliberate misrepresentation of any of the information on the application may subject the applicant to prosecution under applicable State and Federal criminal statutes.

(iii) Except as provided in paragraph (e)(1)(v) of this section, the application for adults shall contain a request for the following information:

(A) The names of all adults for whom application is made;

(B) The names of all other household members;

(C) The social security number of the adult household member who signs the application, or an indication that he/she does not possess a social security number;

(D) The income received by source of income (such as earnings, wages, welfare, pensions, support payments, unemployment compensation, social security, and other cash income received or withdrawn from any other source, including savings, investments, trust accounts and other resources);

(E) A statement which includes substantially the following information: "Section 9 of the National School Lunch Act requires that, unless a food stamp, or FDPIR case number or SSI or Medicaid assistance identification number is provided for the adult for whom benefits are sought, you must include a social security number on the application. This must be the social security number of the adult household member signing the application. If the adult household member signing the application does not possess a social security number, he/she must indicate so on the application. Provision of a social security number is not mandatory, but if a social security number is not provided or an indication is not made that the adult household member signing the application does not have one, the application cannot be approved. This notice must be brought to the attention of the household member whose social security number is disclosed. The social security number may be used to identify the household member in carrying out efforts to verify the correctness of information stated on the application. These verification efforts may be carried out through program reviews, audits and investigations and may include contacting employers to determine income, contacting a food stamp, Indian tribal organization or welfare office to determine current certification for receipt of food stamps or FDPIR benefits, contacting the issuing office of SSI or Medicaid benefits to determine current certification for receipt of these benefits, contacting the State employment security office to determine the amount of benefits received, and checking the documentation produced by household members to provide the amount of income received. These efforts may result in loss or reduction of benefits, administrative claims or legal action if incorrect information is reported." State agencies and institutions shall ensure that the notice complies with section 7 of Pub. L. 93-579. If a State or local agency plans to use the social security numbers for CCFP verification purposes in a manner not described by this notice, the notice shall be altered to include a description of those uses; and

(F) The signature of an adult member of the household which appears immediately below a statement that the person signing the application certifies that all information furnished is true and correct; that the application is being made in connection with the receipt of Federal funds; that Program officials may verify the information on the application; and that the deliberate misrepresentation of any of the information on the application may subject the applicant to prosecution under applicable State and Federal criminal statutes.

(iv) If they so desire, households applying on behalf of children who are members of food stamp or FDPIR households or AFDC assistance units may apply under this paragraph rather than under the procedures described in paragraph (e)(1)(ii) of this section. In addition, households of children enrolled in tier II day care homes who are participating in a Federally or State supported child care or other benefit program with an income eligibility limit that does not exceed the eligibility standard for free and reduced price meals may apply under this paragraph rather than under the procedures described in paragraph (e)(1)(ii) of this section. Households applying on behalf of children who are 0members of food stamp or FDPIR households; AFDC assistance units; or for children enrolled in tier II day care homes, other qualifying Federal or State program, shall be required to provide:

(A) For the child(ren) for whom automatic free meal eligibility is claimed, their names and food stamp, FDPIR, or AFDC case number; or for the households of children enrolled in tier II day care homes, their names and other program case numbers (if the program utilizes case numbers); and

(B) The signature of an adult member of the household as provided for in paragraph (e)(1)(ii)(G) of this section. In accordance with paragraph (e)(1)(ii)(F) of this section, if a case number is provided, it may be used to verify the current certification for the child(ren) for whom free meal benefits are claimed. Whenever households apply for children not receiving food stamp, FDPIR, or AFDC benefits; or for tier II homes, other qualifying Federal or State program benefits, they must apply in accordance with the requirements set forth in paragraph (e)(1)(ii) of this section.

(v) If they so desire, households applying on behalf of adults who are members of food stamp or FDPIR households or SSI or Medicaid participants may apply for free meal benefits under this paragraph rather than under the procedures described in paragraph (e)(1)(iii) of this section. Households applying on behalf of adults who are members of food stamp or FDPIR households or SSI or Medicaid participants shall be required to provide:

(A) The names and food stamp or FDPIR case numbers or SSI or Medicaid assistance identification numbers of the adults for whom automatic free meal eligibility is claimed; and

(B) The signature of an adult member of the household as provided in paragraph (e)(1)(iii)(F) of this section. In accordance with paragraph (e)(1)(iii)(G) of this section, if a food stamp or FDPIR case number or SSI or Medicaid assistance identification number is provided, it may be used to verify the current food stamp, FDPIR, SSI, or Medicaid certification for the adult(s) for whom free meal benefits are being claimed. Whenever households apply for benefits for adults not receiving food stamp, FDPIR, SSI, or Medicaid benefits, they must apply in accordance with the requirements set forth in paragraph (e)(1)(iii) of this section.

(vi) A sponsoring organization of day care homes may identify enrolled children eligible for free and reduced price meals (i.e., tier I rates), without distributing free and reduced price applications, by documenting the child's or household's participation in or receipt of benefits under a Federally or State supported child care or other benefit program with an income eligibility limit that does not exceed the eligibility standard for free and reduced price meals. Documentation shall consist of official evidence, available to the tier II day care home or sponsoring organization, and in the possession of the sponsoring organization, of the household's participation in the qualifying program.

(2) *Letter to households.* Institutions shall distribute a letter to households or guardians of enrolled participants in order to inform them of the procedures regarding eligibility for free and reduced-price meals. The letter shall accompany the application required under paragraph (e)(1) of this section and shall contain:

- (i) The income standards for reduced-price meals, with an explanation that households with incomes less than or equal to the reduced-price standards would be eligible for free or reduced-price meals (the income standards for free meals shall *not* be included in letters or notices to such applicants);
  - (ii) How a participant's household may make application for free or reduced-price meals;
  - (iii) An explanation that an application for free or reduced price benefits cannot be approved unless it contains complete "documentation" as defined in §226.2.
  - (iv) The statement: "In the operation of child feeding programs, no person will be discriminated against because of race, color, national origin, sex, age, or handicap";
  - (v) A statement to the effect that participants having family members who become unemployed are eligible for free or reduced-price meals during the period of unemployment, provided that the loss of income causes the family income during the period of unemployment to be within the eligibility standards for those meals;
  - (vi) Except in the case of adult participants, a statement to the effect that in certain cases foster children are eligible for free or reduced-price meals regardless of the income of such household with whom they reside and that households wishing to apply for such benefits for foster children should contact the institution; and
  - (vii) An explanation that households receiving free and reduced-price meals must notify appropriate institution officials during the year of any decreases in household size or increases in income of over \$50 per month or \$600 per year or --
  - (A) In the case of households of enrolled children that provide a food stamp, FDPIR or AFDC case number to establish a child's eligibility for free meals, any termination in the child's certification to participate in the Food Stamp, FDPIR or AFDC Programs, or
  - (B) In the case of households of adult participants that provide a food stamp or FDPIR case number or an SSI or Medicaid assistance identification number to establish an adult's eligibility for free meals, any termination in the adult's certification to participate in the Food Stamp, FDPIR, SSI or Medicaid Programs.
- (3) In addition to the information listed in paragraph (e)(2) of this section pricing institutions must include in their letter to household an explanation that indicates that: (i) The information in the application may be verified at any time during the year; and (ii) how a family may appeal a decision of the institution to deny, reduce, or terminate benefits as described under the hearing procedure set forth in paragraph (c)(4) of this section.
- (4) *Determination of eligibility.* The institution shall take the income information provided by the household on the application and calculate the household's total current income. When a completed application furnished by a family indicates that the family meets the eligibility criteria for free or reduced-price meals, the participants from that family shall be determined eligible for free or reduced-price meals. Institutions that are pricing programs shall promptly provide written notice to each family informing them of the results of the eligibility determinations. When the information furnished by the family is not complete or does not meet the eligibility criteria for free or reduced-price meals, institution officials must consider the participants from that family as not eligible for free or reduced-price meals, and must consider the participants as eligible for "paid" meals. When information furnished by the family of participants enrolled in a pricing program does not meet the eligibility criteria for free or reduced-price meals, pricing program officials shall provide written notice to each family denied free or reduced-price benefits. At a minimum, this notice shall include:

- (i) The reason for the denial of benefits, e.g., income in excess of allowable limits or incomplete application;
- (ii) Notification of the right to appeal;
- (iii) Instructions on how to appeal; and
- (iv) A statement reminding the household that they may reapply for free or reduced-price benefits at any time during the year,

The reasons for ineligibility shall be properly documented and retained on file at the institution.

(5) *Appeals of denied benefits.* A family that wishes to appeal the denial of an application in a pricing program shall do so under the hearing procedures established under paragraph (c)(4) of this section. However, prior to initiating the hearing procedures, the household may request a conference to provide all affected parties the opportunity to discuss the situation, present information and obtain an explanation of the data submitted on the application or the decision rendered. The request for a conference shall not in any way prejudice or diminish the right to a fair hearing. The institution shall promptly schedule a fair hearing, if requested.

(f) Free, reduced-price and paid meal eligibility figures must be reported by institutions to State agencies at least once each year and shall be based on current family-size and income information of enrolled participants. Such information shall be no more than 12 months old.

(g) Sponsoring organizations for family day care homes shall ensure that no separate charge for food service is imposed on families of children enrolled in participating family day care homes.

(h) *Verification of eligibility.* State agencies shall conduct verification of eligibility for free and reduced-price meals on an annual basis, in accordance with the verification procedures outlined in paragraphs (h) (1) and (2) of this section. Verification may be conducted in accordance with Program assistance requirements of §226.6(l); however, the performance of verification for individual institutions shall occur no less frequently than once every four years. Any State may, with the written approval of FNSRO, use alternative approaches in the conduct of verification, provided that the results achieved meet the requirements of this part. If the verification process discloses deficiencies with the determination of eligibility and/or application procedures which exceed maximum levels established by FNS, State agencies shall conduct follow-up reviews for the purpose of determining that corrective action has been taken by the institution. These reviews shall be conducted within one year of the date the verification process was completed. The verification effort shall be applied without regard to race, color, national origin, sex, age, or handicap. State agencies shall maintain on file for review a description of the annual verification to be accomplished in order to demonstrate compliance with paragraphs (h) (1) and (2) of this section.

(1) *Verification procedures for nonpricing programs.* Except for sponsoring organizations of family day care homes, State agency verification procedures for nonpricing programs shall consist of a review of all approved free and reduced price applications on file. For sponsoring organizations of family day care homes, State agency verification procedures shall consist of a review only of the approved free and reduced price applications (or other documentation, if vouchers or other documentation are used in lieu of free and reduced price applications) on file for those day care homes that are required to be reviewed when the sponsoring organization is reviewed, in accordance with the review requirements set forth in section 226.6(l) of this Part. However, the State agency shall ensure that the day care homes selected for review are representative of the proportion of tier I, tier II, and tier II day care homes with a mix of income-eligible and non-income-eligible children in the sponsorship, and shall ensure that at least 10

percent of all free and reduced price applications (or other documentation, if applicable) on file for the sponsorship are verified. The review of applications shall ensure that:

- (i) The application has been correctly and completely executed by the household;
- (ii) The institution has correctly determined and classified the eligibility of enrolled participants for free or reduced price meals or, for family day care homes, for tier I or tier II reimbursement, based on the information included on the application submitted by the household;
- (iii) The institution has accurately reported to the State agency the number of enrolled participants meeting the criteria for free or reduced price meal eligibility or, for day care homes, the number of participants meeting the criteria for tier I reimbursement, and the number of enrolled participants that do not meet the eligibility criteria for those meals; and
- (iv) In addition, the State agency may conduct further verification of the information provided by the household on the approved application for program meal eligibility. If this effort is undertaken, the State agency shall conduct this further verification for nonpricing programs in accordance with the procedures described in paragraph (h)(2) of this section.

(2) *Verification procedures for pricing programs.* (i) For pricing programs, in addition to the verification procedures described in paragraph (h)(1) of this section, State agencies shall also conduct verification of the income information provided on the approved application for free and reduced price meals and, at State agency discretion, verification may also include confirmation of other information required on the application. However,

(A) If a food stamp, FDPIR or AFDC case number is provided for a child, verification for such child shall include only confirmation that the child is included in a currently certified food stamp or FDPIR household or AFDC assistance unit; or

(B) If a food stamp or FDPIR case number or SSI or Medicaid assistance identification number is provided for an adult, verification for such adult shall include only confirmation that the adult is included in a currently certified food stamp or FDPIR household or is currently certified to receive SSI or Medicaid benefits.

(ii) State agencies shall perform verification on a random sample of no less than 3 percent of the approved free and reduced price applications in an institution which is a pricing program.

(iii) Households shall be informed in writing that they have been selected for verification and they are required to submit the requested verification information to confirm their eligibility for free or reduced-price benefits by such date as determined by the State agency. Those households shall be informed of the type or types of information and/or documents acceptable to the State agency and the name and phone number of an official who can answer questions and assist the household in the verification effort. This information must include a social security number for each adult household member or an indication that he/she does not have one. State agencies shall inform selected households that:

(A) Section 9 of the National School Lunch Act requires that, unless households provide the child's food stamp, FDPIR or AFDC case number, or the adult participant's food stamp or FDPIR case number or SSI or Medicaid assistance identification number, those selected for verification must provide the social security number of each adult household member;

(B) In lieu of providing a social security number, an adult household member may indicate that he/she does not possess one;

(C) Provision of a social security number is not mandatory, but if a social security number is not provided for each adult household member or an indication is not made that he/she does not possess one, benefits will be terminated;

(D) The social security number may be used to identify household members in carrying out efforts to verify the correctness of information stated on the application and continued eligibility for the program. These verification efforts may be carried out through program reviews, audits, and investigations and may include contacting employers to determine income, contacting Federal, State or local agencies to determine current certification for receipt of food stamps or FDPIR, AFDC, SSI or Medicaid benefits, contacting the State employment security office to determine the amount of benefits received, and checking the documentation produced by household members to prove the amount of income received. These efforts may result in loss or reduction of benefits, administrative claims or legal actions if incorrect information was reported; and

(E) This information must be provided to the attention of each adult household member disclosing his/her social security number. State agencies shall ensure that the notice complies with section 7 of Pub. L. 93-579 (Privacy Act of 1974). These households shall be provided with the name and phone number of an official who can assist in the verification effort.

(iv) Households of enrolled children selected for verification shall also be informed that if they are currently certified to participate in the Food Stamp, FDPIR, or AFDC Program they may submit proof of that certification in lieu of income information. In those cases, such proof shall consist of a current "Notice of Eligibility" for Food Stamp, FDPIR, or AFDC Program benefits or equivalent official documentation issued by a food stamp, Indian Tribal Organization, or welfare office which shows that the children are members of households or assistance units currently certified to participate in the Food Stamp, FDPIR, or AFDC Programs. An identification card for any of these programs is not acceptable as verification unless it contains an expiration date. Households of enrolled adults selected for verification shall also be informed that if they are currently certified to participate in the Food Stamp Program or FDPIR or SSI or Medicaid Programs, they may submit proof of that certification in lieu of income information. In those cases, such proof shall consist of:

(A) A current "Notice of Eligibility" for Food Stamp or FDPIR benefits or equivalent official documentation issued by a food stamp, Indian Tribal Organization, or welfare office which shows that the adult participant is a member of a household currently certified to participate in the Food Stamp Program or FDPIR. An identification card is not acceptable as verification unless it contains an expiration date; or

(B) Official documentation issued by an appropriate SSI or Medicaid office which shows that the adult participant currently receives SSI or Medicaid assistance. An identification card is not acceptable as verification unless it contains an expiration date. All households selected for verification shall be advised that failure to cooperate with verification efforts will result in a termination of benefits.

(v) Sources of information for verification may include written evidence, collateral contacts, and/or systems of records.

(A) *Written evidence* shall be used as the primary source of information for verification. Written evidence includes written confirmation of a household's circumstances, such as wage stubs, award letters, letters from employers, and, for enrolled children, current certification to participate in the Food Stamp, FDPIR or AFDC Programs, or, for adult participants, current certification to participate in the Food Stamp, FDPIR, SSI or Medicaid Programs. Whenever written evidence is insufficient to confirm eligibility, the State agency may use collateral contacts.

(B) *Collateral contact* is a verbal confirmation of a household's circumstances by a person outside of the household. The collateral contact may be made in person or by phone and shall be authorized by the household. The verifying official may select a collateral contact if the household fails to designate one or designates one which is unacceptable to the verifying official. If the verifying official designates a collateral contact, the contact shall not be made without providing written or oral notice to the household. At the time of this notice, the household shall be informed that it may consent to the contact or provide acceptable verification in another form. The household shall be informed that its eligibility for free or reduced price meals shall be terminated if it refuses to choose one of these options. Termination shall be made in accordance with paragraph (h)(2)(vii) of this section. Collateral contacts could include employers, social service agencies, and migrant agencies.

(C) *Systems of records* to which the State agency may have routine access are not considered collateral contacts. Information concerning income, family size, or food stamp/FDPIR/AFDC certification for enrolled children, or food stamp/FDPIR/SSI/Medicaid certification for enrolled adults, which is maintained by other government agencies and to which a State agency can legally gain access may be used to confirm a household's eligibility for Program meal benefits. One possible source could be wage and benefit information maintained by the State unemployment agency, if that information is available. The use of any information derived from other agencies must be used with applicable safeguards concerning disclosure.

(vi) Verification by State agencies of receipt of food stamps, FDPIR, AFDC, SSI or Medicaid benefits shall be limited to a review to determine that the period of eligibility is current. If the benefit period is found to have expired, or if the household's certification has been terminated, the household shall be required to document their income eligibility.

(vii) The State agency may work with the institution to verify the documentation submitted by the household on the application; however, the responsibility to complete the verification process may not be delegated to the institution.

(viii) If a household refuses to cooperate with efforts to verify, or the verification of income indicates that the household is ineligible to receive benefits or is eligible to receive reduced benefits, the State agency shall require the pricing program institution to terminate or adjust eligibility in accordance with the following procedures. Institution officials shall immediately notify families of the denial of benefits in accordance with paragraphs (e)(4) and (e)(5) of this section. Advance notification shall be provided to families which receive a reduction or termination of benefits 10 calendar days prior to the actual reduction or termination. The 10-day period shall begin the day the notice is transmitted to the family. The notice shall advise the household of: (A) The change; (B) the reasons for the change; (C) notification of the right to appeal the action and the date by which the appeal must be requested in order to avoid a reduction or termination of benefits; (D) instructions on how to appeal; and (E) the right to reapply at any time during the year. The reasons for ineligibility shall be properly documented and retained on file at the institution.

(ix) When a household disagrees with an adverse action which affects its benefits and requests a fair hearing, benefits shall be continued as follows while the household awaits the hearing:

(A) Households which have been approved for benefits and which are subject to a reduction or termination of benefits later in the same year shall receive continued benefits if they appeal the adverse action within the 10-day advance notice period; and

(B) Households which are denied benefits upon application shall not receive benefits.

(3) State agencies shall inform institution officials of the results of the verification effort and the action which will be taken in response to the verification findings. This notification shall be made in accordance with the procedures outlined in §226.14(a).

(4) If the verification results disclose that an institution has inaccurately classified or reported the number of participants eligible for free, reduced-price or paid meals, the State agency shall adjust institution rates of reimbursement retroactive to the month in which the incorrect eligibility figures were reported by the institution to the State agency.

(5) If the verification results disclose that a household has not reported accurate documentation on the application which would support continued eligibility for free or reduced-price meals, the State agency shall immediately adjust institution rates of reimbursement. However, this rate adjustment shall not become effective until the affected households have been notified in accordance with the procedures of paragraph (h)(2)(vi) of this section and any ensuing appeals have been heard as specified in paragraph (h)(2)(viii) of this section.

(6) *Verification procedures for sponsoring organizations of day care homes.* Prior to approving an application for a day care home that qualifies as tier I day care home on the basis of the provider's household income, sponsoring organizations of day care homes shall conduct verification of such income in accordance with the procedures contained in paragraph (h)(2)(i) of this section. Sponsoring organizations of day care homes may verify the information on applications submitted by households of children enrolled in day care homes in accordance with the procedures contained in paragraph (h)(2)(i) of this section.

(i) *Disclosure of program eligibility information to State Medicaid (Medicaid) and the State Children's Health Insurance Program (SCHIP)* Program eligibility information about children eligible for free and reduced price meals may be disclosed to Medicaid and SCHIP as described in this section.

(1) *Who decides whether to disclose program eligibility information to Medicaid and/or SCHIP?* The State agency may elect to allow institutions to disclose children's free and reduced price meal eligibility information to Medicaid and SCHIP. Institutions may then elect to do so. Children's program eligibility information may only be disclosed to Medicaid or SCHIP when both the State agency and the institution so elect, the parent/guardian does not decline to have their eligibility information disclosed as described in paragraph (i)(5), and the requirements in this paragraph (i) are met.

(2) *What information may we disclose for use by Medicaid and SCHIP?* The State agency or institution, as appropriate, may disclose children's names, eligibility status (whether they are eligible for free or reduced price meals), and any other eligibility information obtained through the free and reduced price meal application to persons directly connected with the administration of Medicaid or SCHIP.

(3) *Who are persons "directly connected" with the administration of Medicaid and SCHIP?* State employees and persons authorized under Federal and State Medicaid and SCHIP requirements to carry out initial processing of Medicaid or SCHIP applications or to make eligibility determinations are persons directly connected with the administration of Medicaid and SCHIP for purposes of disclosure of children's free and reduced price meal eligibility information.

(4) *What are the restrictions on how Medicaid and SCHIP use children's free and reduced price meal eligibility information?* Medicaid and SCHIP agencies and health insurance program operators receiving children's free and reduced price meal eligibility information may only use the information to seek to enroll children in Medicaid or SCHIP. The Medicaid and SCHIP enrollment process may include targeting and identifying children from low-income households

who are potentially eligible for Medicaid or SCHIP for the purpose of seeking to enroll them in Medicaid or SCHIP.

(5) *What are the requirements for notifying households of potential disclosure to Medicaid or SCHIP?* The State agency or institution, as appropriate, must notify parents/guardians that children's free or reduced price meal eligibility information will be disclosed to Medicaid and/or SCHIP unless the parent/guardian elects not to have their information disclosed. Additionally, the State agency or institution, as appropriate, must give parents/guardians an opportunity to elect not to have their information disclosed to Medicaid or SCHIP. Only the parent or guardian who is a member of the household or family for purposes of the free and reduced price meal or free milk application may decline the disclosure of eligibility information. The notification must inform parents/guardians that they are not required to consent to the disclosure, that the information, if disclosed, will be used to identify children eligible for and to seek to enroll children in a health insurance program, and that their decision will not affect their children's eligibility for free or reduced price meals. The notification may be included in the letter/notice to parents/guardians that accompanies the free and reduced price application, on the application itself or in a separate notice provided to parents/guardians. The notice must give parents/guardians adequate time to respond. For children determined eligible through direct certification, the notice of potential disclosure may be included in the document informing parents/guardians of their children's eligibility for free meals through direct certification.

(6) *May social security numbers be disclosed?* The State agency or institution, as appropriate, may disclose social security numbers to any programs or persons authorized to receive all program eligibility information under this paragraph (i), provided parents/guardians have not declined to have their information disclosed. However, State agencies and institutions that plan to disclose social security numbers must give notice of the planned use of the social security numbers. This notice must be in accordance with section 7(b) of the Privacy Act of 1974 (5 U.S.C. 552a note). The application must include substantially the following language for disclosures of social security numbers to Medicaid or SCHIP: "The social security number may also be disclosed to Medicaid and the State Children's Health Insurance Program for the purpose of identifying and seeking to enroll eligible children in one of these health insurance programs." This language is in addition to the notice required in paragraph (e)(1)(i)(F) of this section. State agencies and institutions are responsible for drafting the appropriate notice for disclosures of social security numbers.

(7) *Are agreements required before disclosing program eligibility information?* The State agency or institution, as appropriate, must have a written agreement with the State or local agency or agencies administering Medicaid or SCHIP prior to disclosing children's free and reduced price eligibility information. At a minimum, the agreement must:

- (i) Identify the health insurance program or health agency receiving children's eligibility information;
- (ii) Describe the information that will be disclosed;
- (iii) Require that the Medicaid or SCHIP agency use the information obtained and specify that the information must only be used to seek to enroll children in Medicaid or SCHIP;
- (iv) Describe how the information will be protected from unauthorized uses and disclosures;
- (v) Describe the penalties for unauthorized disclosure; and
- (vi) Be signed by both the Medicaid or SCHIP program or agency and the State agency or institution, as appropriate.

(8) *What are the penalties for unauthorized disclosure or misuse of information?* In accordance with section 9(b)(2)(C)(v) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1758(b)(2)(C)(v)), any individual who publishes, divulges, discloses or makes known in any manner, or to any extent not authorized by statute or this section, any information obtained under this paragraph (i) will be fined not more than \$1,000 or imprisoned for up to 1 year, or both.

(9) *What are the State agency's responsibilities regarding disclosures?* State agencies that elect to allow disclosure of children's free and reduced price meal eligibility information to Medicaid or SCHIP, as provided in this paragraph (i), must ensure that any institution acting in accordance with that option:

(i) Has a written agreement with the State or local agency or agencies administering health insurance programs for children under titles XIX and XXI of the Social Security Act (42 U.S.C. 1396 *et seq.* and 1397aa *et seq.*) that requires the health agencies to use children's free and reduced price meal eligibility information to seek to enroll children in those health insurance programs; and

(ii) Notifies each household of the information that will be disclosed, that the information disclosed will be used only to seek to enroll children in Medicaid or SCHIP and provides each parent/guardian with an opportunity to elect not to have the information disclosed.

[47 FR 36527, Aug. 20, 1982, as amended at 49 FR 14078, Apr. 10, 1984; 50 FR 19310, May 8, 1985; 50 FR 20197, May 15, 1985; 52 FR 36907, Oct. 2, 1987; 53 FR 52594, Dec. 28, 1988; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 61 FR 25555, May 22, 1996; 62 FR 904, Jan. 7, 1997; 62 FR 5519, Feb. 6, 1997; 62 FR 23619, May 1, 1997; 63 FR 9105, Feb. 24, 1998; 63 FR 9729, Feb. 26, 1998; 66 FR 2203, Jan. 11, 2001]

## **Subpart F -- Food Service Equipment Provisions**

### **§226.24 Property management requirements.**

Institutions and administering agencies shall follow the policies and procedures governing title, use, and disposition of equipment obtained by purchase, whose cost was acquired in whole or part with food service equipment assistance funds in accordance with the Department's Uniform Federal Assistance Regulations (7 CFR part 3015).

[48 FR 41142, Sept. 14, 1983]

## **Subpart G -- Other Provisions**

### **§226.25 Other provisions.**

(a) *Grant closeout procedures.* Grant closeout procedures for the Program shall be in accordance with the Uniform Federal Assistance Regulations.

(b) *State requirements.* Nothing contained in this part shall prevent a State agency from imposing additional requirements for participation in the Program which are not inconsistent with the provisions of this part; however, any additional requirements shall be approved by FNSRO and may not deny the Program to an eligible institution.

(c) *Value of assistance.* The value of assistance to participants under the Program shall not be considered to be income or resources for any purposes under any Federal or State laws, including, but not limited to laws relating to taxation, welfare, and public assistance programs.

(d) *Maintenance of effort.* Expenditure of funds from State and local sources for the maintenance of food programs for children shall not be diminished as a result of funds received under the Act.

(e) *Fraud penalty.* Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property that are the subject of a grant or other form of assistance under this part, whether received directly or indirectly from the Department or whoever receives, conceals, or retains such funds, assets, or property to his use or gain, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud shall, if such funds, assets, or property are of the value of \$100 or more, be fined not more than \$10,000 or imprisoned not more than five years, or both, or, if such funds, assets, or property are of value of less than \$100, shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.

(f) *Claims adjustment authority.* The Secretary shall have the authority to determine the amount of, to settle, and to adjust any claim arising under the Program, and to compromise or deny such claim or any part thereof. The Secretary shall also have the authority to waive such claims if the Secretary determines that to do so would serve the purposes of the program. This provision shall not diminish the authority of the Attorney General of the United States under section 516 of title 28, U.S. Code, to conduct litigation on behalf of the United States.

(g) *Special retroactivity provisions.* Notwithstanding any other provisions contained in this part, the following shall apply:

(1) State agencies shall provide reimbursement for meals served by any adult day care center between October 1, 1987 and the date of the initial Program agreement between the State agency and the center under the following conditions, provided that:

(i) The center can document that, for any meals claimed:

(A) Meals served met all requirements including items and quantities served;

(B) Free and reduced-price applications were on file if reimbursement for free or reduced-price meals is sought;

(C) Meal counts by category (free, reduced-price and paid) and type served (breakfast, lunch, supper and supplement) are available;

(D) Appropriate food service revenue and expenditure records are available;

(E) Reimbursement has not been received under title III of the Older Americans Act for the claimed meals and CCFP reimbursement does not duplicate other funding for the claimed meals; and

(ii) The application for Program participation is postmarked or submitted to the State agency no later than April 17, 1989, and the claims for reimbursement for the meals served between October 1, 1987 and the date of the initial agreement between the State agency and the center are postmarked or submitted to the State agency no later than April 17, 1989 or the date set by §226.10(e), whichever is later.

(2) Alternative documentation for free meal eligibility for adult participants shall be based on the following:

- (i) Beginning with October 1, 1987, documentation of membership in a food stamp household;
  - (ii) For the period October 1, 1987 through September 30, 1988, documentation of membership in an AFDC assistance unit; and
  - (iii) Beginning October 1, 1988, documentation of receipt of assistance under Medicaid or SSI.
- (3) For the period October 1, 1987 through September 30, 1988, the family of an adult participant applying for free or reduced-price meals shall include a group of related or nonrelated individuals, who are not residents of an institution or boarding house, but who are living as one economic unit. However, beginning October 1, 1988, the family of an adult participant applying for free or reduced-price meals shall include only the adult participant and any spouse or dependent(s) residing with the adult participant.

[47 FR 36527, Aug. 20, 1982, as amended at 53 FR 52597, Dec. 28, 1988; 54 FR 13049, Mar. 30, 1989]

#### **§226.26 Program information.**

Persons desiring information concerning the Program may write to the appropriate State agency or Regional Office of FNS as indicated below:

- (a) In the States of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont: Northeast Regional Office, FNS, U.S. Department of Agriculture, 10 Causeway Street, Room 501, Boston, MA 02222-1065.
- (b) In the States of Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, and West Virginia: Mid-Atlantic Regional Office, FNS, U.S. Department of Agriculture, 300 Corporate Boulevard, Robbinsville, NJ 08691-1598.
- (c) In the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee: Southeast Regional Office, FNS, U.S. Department of Agriculture, 61 Forsyth Street, SW., Room 8T36, Atlanta, GA 30303.
- (d) In the States of Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin: Midwest Regional Office, FNS, U.S. Department of Agriculture, 77 Jackson Boulevard, 20th Floor, Chicago, IL 60604-3507.
- (e) In the States of Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah and Wyoming: Mountain Plains Regional Office, FNS, U.S. Department of Agriculture, 1244 Speer Boulevard, Suite 903, Denver, CO 80204.
- (f) In the States of Arkansas, Louisiana, New Mexico, Oklahoma and Texas: Southwest Regional Office, FNS, U.S. Department of Agriculture, 1100 Commerce Street, Room 5-C-30, Dallas, TX 75242.
- (g) In the States of Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, the Commonwealth of the Northern Mariana Islands, and Washington: Western Regional Office, FNS, U.S. Department of Agriculture, 550 Kearney Street, Room 400, San Francisco, CA 94108.

[47 FR 36527, Aug. 20, 1982; 47 FR 46072, Oct. 15, 1982, as amended at 48 FR 40197, Sept. 6, 1983; 53 FR 52598, Dec. 28, 1988; 65 FR 12442, Mar. 9, 2000]

#### **§226.27 Information collection/recordkeeping -- OMB assigned control numbers.**

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Current OMB

7 CFR section where requirements are described	control
number	
226.3-226.4.....	0584-0055
226.6-226.10.....	0584-0055
226.14-226.16.....	0584-0055
226.23-226.24.....	0584-0055

[50 FR 53258, Dec. 31, 1985]

## Appendix A to Part 226 -- Alternate Foods for Meals

### ALTERNATE PROTEIN PRODUCTS

#### **A. What are the criteria for alternate protein products used in the Child and Adult Care Food Program?**

1. An alternate protein product used in meals planned under the provisions in §226.20 must meet all of the criteria in this section.
2. An alternate protein product whether used alone or in combination with meat or meat alternate must meet the following criteria:
  - a. The alternate protein product must be processed so that some portion of the non-protein constituents of the food is removed. These alternate protein products must be safe and suitable edible products produced from plant or animal sources.
  - b. The biological quality of the protein in the alternate protein product must be at least 80 percent that of casein, determined by performing a Protein Digestibility Corrected Amino Acid Score (PDCAAS).
  - c. The alternate protein product must contain at least 18 percent protein by weight when fully hydrated or formulated. ("When hydrated or formulated" refers to a dry alternate protein product and the amount of water, fat, oil, colors, flavors or any other substances which have been added).
  - d. Manufacturers supplying an alternate protein product to participating schools or institutions must provide documentation that the product meets the criteria in paragraphs A.2. through c of this appendix.
  - e. Manufacturers should provide information on the percent protein contained in the dry alternate protein product and on an as prepared basis.
  - f. For an alternate protein product mix, manufacturers should provide information on:
    - (1) The amount by weight of dry alternate protein product in the package;
    - (2) Hydration instructions; and
    - (3) Instructions on how to combine the mix with meat or other meat alternates.

#### **B. How are alternate protein products used in the Child and Adult Care Food Program?**

1. Schools, institutions, and service institutions may use alternate protein products to fulfill all or part of the meat/meat alternate component discussed in §226.20.
  2. The following terms and conditions apply:
    - a. The alternate protein product may be used alone or in combination with other food ingredients. Examples of combination items are beef patties, beef crumbles, pizza topping, meat loaf, meat sauce, taco filling, burritos, and tuna salad.
    - b. Alternate protein products may be used in the dry form (nonhydrated), partially hydrated or fully hydrated form. The moisture content of the fully hydrated alternate protein product (if prepared from a dry concentrated form) must be such that the mixture will have a minimum of 18 percent protein by weight or equivalent amount for the dry or partially hydrated form (based on the level that would be provided if the product were fully hydrated).
- C. How are commercially prepared products used in the Child and Adult Care Food Program?*
- Schools, institutions, and service institutions may use a commercially prepared meat or meat alternate product combined with alternate protein products or use a commercially prepared product that contains only alternate protein products.

Appendix B to Part 226 [Reserved]

**Appendix C to Part 226 -- Child Nutrition (CN) Labeling Program**

1. The Child Nutrition (CN) Labeling Program is a voluntary technical assistance program administered by the Food and Nutrition Service (FNS) in conjunction with the Food Safety and Inspection Service (FSIS), and Agricultural Marketing Service (AMS) of the U.S. Department of Agriculture (USDA), and National Marine Fisheries Service of the U.S. Department of Commerce (USDC) for the Child Nutrition Programs. This program essentially involves the review of a manufacturer's recipe or product formulation to determine the contribution a serving of a commercially prepared product makes toward meal pattern requirements and a review of the CN label statement to ensure its accuracy. CN labeled products must be produced in accordance with all requirements set forth in this rule.

2. Products eligible for CN labels are as follows:

(a) Commercially prepared food products that contribute significantly to the meat/meat alternate component of meal pattern requirements of 7 CFR 210.10, 225.21, and 226.20 and are served in the main dish.

(b) Juice drinks and juice drink products that contain a minimum of 50 percent full-strength juice by volume.

3. For the purpose of this appendix the following definitions apply:

(a) *CN label* is a food product label that contains a CN label statement and CN logo as defined in paragraph 3 (b) and (c) below.

(b) The *CN logo* (as shown below) is a distinct border which is used around the edges of a "CN label statement" as defined in paragraph 3(c).



(c) The *CN label statement* includes the following:

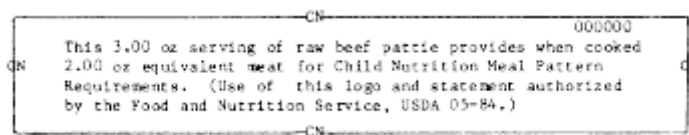
(1) The product identification number (assigned by FNS),

(2) The statement of the product's contribution toward meal pattern requirements of 7 CFR 210.10, 220.8, 225.21, and 226.20. The statement shall identify the contribution of a specific portion of a meat/meat alternate product toward the meat/meat alternate, bread/bread alternate, and/or vegetable/fruit component of the meal pattern requirements. For juice drinks and juice drink products the statement shall identify their contribution toward the vegetable/fruit component of the meal pattern requirements,

(3) Statement specifying that the use of the CN logo and CN statement was authorized by FNS, and

(4) The approval date.

For example:



(d) *Federal inspection* means inspection of food products by FSIS, AMS or USDC.

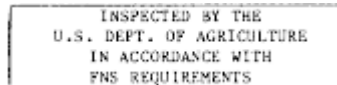
4. Food processors or manufacturers may use the CN label statement and CN logo as defined in paragraph 3 (b) and (c) under the following terms and conditions:

(a) The CN label must be reviewed and approved at the national level by the Food and Nutrition Service and appropriate USDA or USDC Federal agency responsible for the inspection of the product.

(b) The CN labeled product must be produced under Federal inspection by USDA or USDC. The Federal inspection must be performed in accordance with an approved partial or total quality control program or standards established by the appropriate Federal inspection service.

(c) The CN label statement must be printed as an integral part of the product label along with the product name, ingredient listing, the inspection shield or mark for the appropriate inspection program, the establishment number where appropriate, and the manufacturer's or distributor's name and address.

(1) The inspection marking for CN labeled non-meat, non-poultry, and non-seafood products with the exception of juice drinks and juice drink products is established as follows:



(d) Yields for determining the product's contribution toward meal pattern requirements must be calculated using the *Food Buying Guide for Child Nutrition Programs* (Program Aid Number 1331).

5. In the event a company uses the CN logo and CN label statement inappropriately, the company will be directed to discontinue the use of the logo and statement and the matter will be referred to the appropriate agency for action to be taken against the company.

6. Products that bear a CN label statement as set forth in paragraph 3(c) carry a warranty. This means that if a food service authority participating in the child nutrition programs purchases a CN labeled product and uses it in accordance with the manufacturer's directions, the school or institution will not have an audit claim filed against it for the CN labeled product for noncompliance with the meal pattern requirements of 7 CFR 210.10, 220.8, 225.21, and 226.20. If a State or Federal auditor finds that a product that is CN labeled does not actually meet the meal pattern requirements claimed on the label, the auditor will report this finding to FNS. FNS will prepare a report of the findings and send it to the appropriate divisions of FSIS and AMS of the USDA, National Marine Fisheries Services of the USDC, Food and Drug Administration, or the Department of Justice for action against the company. Any or all of the following courses of action may be taken:

(a) The company's CN label may be revoked for a specific period of time;

(b) The appropriate agency may pursue a misbranding or mislabeling action against the company producing the product;

(c) The company's name will be circulated to regional FNS offices;

(d) FNS will require the food service program involved to notify the State agency of the labeling violation.

7. FNS is authorized to issue operational policies, procedures, and instructions for the CN Labeling Program.

To apply for a CN label and to obtain additional information on CN label application procedures write to: CN Labels, U.S. Department of Agriculture, Food and Nutrition Service, Nutrition and Technical Services Division, 3101 Park Center Drive, Alexandria, Virginia 22302.

[49 FR 18457, May 1, 1984; 49 FR 45109, Nov. 15, 1984]